(27,128)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 377.

PORT OF SEATTLE, APPELLANT,

vs.

OREGON & WASHINGTON RAILROAD COMPANY AND J. F. DUTHIE & COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

INDEX.

	Original.	Print.
Names and addresses of counsel	1	1
Bill of complaint	2	1
Exhibit A—Agreement between Oregon and Washington Railroad Company and J. F. Duthie & Co., August 22, 1916	6	3
B—Agreement between Port Commission and J. F. Duthie & Co., October 4, 1916	14	9
Summons	19	12
Petition for removal	20	13
Order granting petition for removal	24	15
Notice presenting petition and bond for removal	25	16
Bond for removal	26	16
Clerk's certificate, King county court	27	17
Motion to strike from bill of complaint	28	18
Motion to remand to State court	29	19
Affidavit of R. S. Terhune in support of motion	31	20
Opinion on motion to remand, Neterer, J.	33	21
Order denying motion to remand	37	23
Order granting motion to strike	38	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 7, 1919.

	Original.	Print.
Answer of Oregon & Washington R. R. Co.	39	24
Election of plaintiff to stand on its complaint	45	28
Answer of J. F. Duthie & Company	46	29
Opinion, Neterer, J.	50	32
Decree	58	38
Order entering exceptions	60	39
Stipulation as to statement of evidence	62	40
Statement of evidence	63	41
Testimony of J. D. Blackwell	63	41
George F. Nicholson	78	49
R. C. Erskine	81	51
George F. Nicholson (recalled)	87	55
Deed, State of Washington to McLaren, July 7, 1904	92	58
Deed, State of Washington to Smith, December 26, 1905	93	59
Plaintiff's Exhibit No. 8—Port commission resolution 142	99	62
No. 10—Form of permit from Port of Seattle for use of waterway areas	102	63
Form of bond	106	65
No. 12—Application for waterway permit, rules, &c.	108	67
Order approving statement of evidence and directing annexation of exhibits	112	69
Petition for appeal	113	70
Assignment of error	115	71
Bond on appeal	118	73
Præcipe for transcript of record	120	74
Clerk's certificate	122	76
Citation and service	124	77
Plaintiff's Exhibit 1—Map of east waterway	128	79
3—Map of Seattle tide lands	129	80
4—Seattle quadrangle topographical maps	130	81
5—Plat of lands lying around and adjacent to Elliott Bay	131	82
6—Typical cross-section of east waterway	132	83
7—Typical cross-section of east waterway	133	84
9—Copy of map showing the structures and industries on the east and west waterways	134	85
11—Plan for improvement of waterway area filed in connection with permit	135	86

1 *Names and Addresses of Counsel.*

Messrs. Preston, Thorgrimson & Turner, Counselors for Appellant, 911 Lowman Building, Seattle, Washington.

Messrs. Bogle, Merritt & Bogle, Counselors for Appellee, Oregon & Washington Railroad Company, 609 Central Building, Seattle, Washington.

Messrs. Aust & Terhune, Counselors for Appellee, J. F. Duthie & Company, a corporation, 404 Boston Block, Seattle, Washington.

2 In the Superior Court of the State of Washington for King County.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Complaint.

Comes now the plaintiff and for cause of action against the defendants alleges:

I.

That the plaintiff is a municipal corporation organized and existing under and by virtue of Chapter 92 of the Laws of 1911, as amended by Chapter 62 of the Laws of 1913, of the State of Washington.

II.

That the defendant Oregon & Washington Railroad Company is a corporation organized under and by virtue of the laws of the State of Oregon, authorized to do, and doing business as a corporation in the State of Washington. That the defendant J. F. Duthie & Company is a corporation organized under the laws of the State of Washington.

III.

That on or about the 22d day of August, 1916, the defendant Oregon & Washington Railroad Company made, executed and delivered a certain indenture of lease to the defendant J. F. Duthie & Company, a copy of which lease is hereto attached, marked Exhibit "A", and by reference made a part hereof.

3

IV.

That the defendant Oregon & Washington Railroad Company is the owner of that piece or parcel of land being a portion of Block 393, Seattle Tidelands, specifically described in Paragraph I of said lease marked Exhibit "A", attached hereto. That said parcel of land abuts upon what is known as the East Waterway, in the City of Seattle, Washington. That the State of Washington and the United States Government have established in said East Waterway, a distance of one hundred twenty five feet (125 ft.) from the shoreline of the premises herein described, a pierhead line, and the waterway area between the said shoreline and the said pierhead line, as the same abuts upon the premises herein described, is within the jurisdiction of the plaintiff acting for and on behalf of the State of Washington. That in the said lease hereto attached and marked Exhibit "A", the said defendant Oregon & Washington Railroad Company purports to claim and does claim jurisdiction over said waterway area. That the said defendant Oregon & Washington Railroad Company has no right, title or interest in said waterway area, and has made no application to the plaintiff for a permit for the use of said waterway area, and the plaintiff has granted no permit for the use of said waterway area, as provided by law or at all, and any claim of title or interest in said waterway area by the Oregon & Washington Railroad Company, or by the defendant J. F. Duthie & Company claiming under the defendant Oregon & Washington Railroad Company, is wholly unfounded.

V.

That on or about the 23d day of November, 1916, the plaintiff, upon application being duly made, granted to the defendant J. F. Duthie & Company a permit for the use of the waterway area abutting upon the property described in the lease referred herein
4 a copy of which permit is hereto attached, marked Exhibit "B", and by reference made a part hereof.

VI.

That plaintiff is informed and believes said information to be true that the rental which the defendant Oregon & Washington Railroad Company fixed in the lease with the defendant J. F. Duthie & Company, a copy of which lease is hereto attached, marked Exhibit "A", was based not only upon the rental value of the tideland lot but also upon the rental value of the harbor area abutting thereon, and plaintiff alleges that by reason thereof the defendant Oregon & Washington Railroad Company is collecting, and will continue to collect rental for said waterway area from the defendant J. F. Duthie & Company.

Wherefore, Plaintiff prays that the defendant Oregon & Washington Railroad Company be permanently enjoined from claiming or exercising any jurisdiction over the waterway area abutting on the said property, and that the court enter a decree directing the said

Oregon & Washington Railroad Company and the said J. F. Duthie & Company to reform said lease by striking therefrom all the passages therein in which the said Oregon & Washington Railroad Company claims jurisdiction over the said waterway area, and attempts to grant to the said defendant J. F. Duthie & Company any right, title or interest therein. That the court ascertain the amount of rental, if any, which the defendant J. F. Duthie & Company has paid or is to pay under the said lease for the Waterway area abutting upon the tideland lot, and that in the event the said J. F. Duthie & Company is paying any rental for said waterway area or has paid any rental for said waterway area, or will pay any rental therefor, that any such sums heretofore paid be remitted to the said Oregon &
5 Washington Railroad Company and that the said Oregon & Washington Railroad Company be enjoined from collecting any further rent for the use of said waterway area; and that the title of the plaintiff, for and on behalf of the State of Washington, in and to said waterway area, be quieted as against the Oregon & Washington Railroad Company and against the defendant J. F. Duthie & Company, save and except as said J. F. Duthie & Company has a right to claim an interest in said waterway area by virtue of the permit granted it by the plaintiff; and that it be decreed that the said Oregon & Washington Railroad Company, as the owner of said tideland lot abutting upon said waterway area, has no right, title or interest in said waterway area, or any part thereof, or any jurisdiction thereover; and for such other and further equitable relief as the court may deem meet and right in the premises.

C. J. FRANCE,
Attorney for Plaintiff.

STATE OF WASHINGTON,
County of King, ss:

Robert Bridges, being first duly sworn, on oath deposes and says: That he is president of the Port Commission of the Port of Seattle, plaintiff in the above entitled action. That he has read the foregoing complaint, knows the contents thereof, and believes the same to be true. That he makes this verification for and on behalf of said plaintiff, being authorized so to do.

ROBERT BRIDGES.

Subscribed and sworn to before me this 22d day of December, 1916.

C. J. FRANCE,
Notary Public in and for the State of Washington, Residing at Seattle.

6 EXHIBIT "A."

This agreement, entered into in duplicate this 22d day of August, 1916, between Oregon and Washington Railroad Company, a corporation organized under and by virtue of the laws of the State of

Oregon, hereinafter called the "Lessor", and J. F. Duthie & Company, a corporation organized under the laws of the state of Washington, hereinafter called the "Lessee"; Witnesseth

I.

That in consideration of the mutual undertakings, covenants and agreements hereinafter contained, and payments to be made by the Lessee to the Lessor, as herein provided, the Lessor does hereby lease and let unto the Lessee the following described parcel of land situated in the City of Seattle, King County, Washington, containing 11.89 acres more or less, and being a part of block 393, Seattle Tide Lands, located upon Harbor Island, according to the plat thereof of record in the office of the County Auditor of said County, said parcel being particularly described as follows, to wit:

A piece or parcel of land, being all that portion of Block 393, Seattle Tide Lands, situated in Seattle, King County, Washington, described as follows:

Beginning at the northwest corner of said Block 393, thence north 45 deg. east one hundred forty-one and forty-two hundredths (141.42) feet; thence due east four hundred and seventy (470) feet to a point in the east line of said Block 393; thence due south following said east line, seven hundred sixty-three and twenty-eight hundredths (763.28) feet, to a reentrant corner of said Block 393; thence due east thirty-five and nineteen hundredths (35.19) feet to the most easterly corner of said line of said Block 393; thence south 14 deg. 30′ west, following the easterly line of said Block 393; one hundred fifty-four and ninety-four hundredths (154.94) feet; thence due west five hundred sixty-six and forty hundredths (566.40) feet to a point in the west line of said Block 393; thence due north following said west line eight hundred thirteen and twenty-eight hundredths (813.28) feet to place of beginning.

II.

The term of this lease is for the period of three (3) years next ensuing from the date of this agreement, and commencing with said date Lessee is to pay the Lessor a rental of Fifteen thousand five hundred thirty-eight and 20/100 ($15,538.20) dollars, per annum, payable in twelve (12) equal monthly installments in advance during the term of this lease, or any extension thereof, and in addition to said stipulated rental, the Lessee promises and agrees to pay to the Lessor before the same become delinquent any and all taxes assessed or levied against said land and improvements placed upon or in connection with the same (including taxes if any are levied or assessed upon the area between the west margin of the waterway on the front of said premises and pierhead line parallel therewith and improvements and property built or placed upon or within said area; and Lessor is privileged to pay said taxes if it elects to do so, and in such event Lessee shall repay to the Lessor the amount thereof within five (5) days from the date of receiving a statement of the

amount thereof from Lessor). Lessee covenants with the Lessor that it will pay said rentals at said times, and will also pay said taxes as they are levied and assessed against said premises and improvements thereon, and before same become delinquent during the term of this lease and any extension thereof.

III.

The Lessee contemplates the construction and development upon said leased premises and the area between same and the pierhead line in front thereof of a ship building and manufacturing plant and it is stipulated that in event Lessee constructs and pays for
8 any buildings, structures or improvements upon said premises during the period of this lease, that it shall be privileged to remove the same at its own expense within ninety (90) days from the expiration or sooner termination of this lease. (This applies to all structures and improvements placed thereon by Lessee to pierhead line except piling in place; but Lessor is hereby granted a lien upon said buildings, structures and improvements, and each and all of them for rent and taxes that may have accrued to the Lessor against the Lessee under this lease, and none of said buildings, structures or improvements shall be removed until said obligations have been paid, nor at all after the expiration of said ninety (90) day period. It being agreed between the parties hereto that unless removed within said time said buildings structures and improvements shall become a part of the realty and property of the Lessor.)

IV.

(Connected with and as a part of the development planned by the Lessee in the use of the leased premises, the Lessee contemplates wharfing out from said leased premises to the pier head line in the waterway in front of said premises, and said construction and development between said pier head line and shore line of the leased premises will, if carried out by the Lessee, occupy the area immediately in front of the foot of Missouri Street in said City of Seattle, Washington, and while Lessor consents to said contemplated use by said Lessee of said property between the shore line and the pier head line Lessee accepts and receives this lease with the understanding that the Lessor assumes no obligation with respect to the securing of any permit or permits from state or municipal authority for the construction upon, development of or use by the Lessee of the area between the east line of the leased premises, and the pier head line in front of parallel to same; but all permits lawfully required for any
9 and all development, construction and operation to be done or prosecuted by the Lessee are to be secured by the latter at its own cost and expense.)

V.

The Lessee covenants that it will not assign this lease or any interest therein, nor sub-let said premises or any part thereof, or grant

any privilege or use of said premises, or any of its appurtenances to any one whomsoever without the written consent of the Lessor first had and obtained; and the Lessee will at the termination of the lease peaceably quit and deliver up to the Lessor, its successors and assigns said leased premises and the area in front thereof to the pier head line and its appurtenances.

VI.

If the Lessee fails or neglects to pay the rentals herein reserved at the time and manner herein provided for, or neglects or fails to perform or observe any of the covenants or agreements contained in this contract to be performed and observed by it according to the terms thereof, then and in such case (notwithstanding any license of any form, breach of covenant, or waiver of or consent in any former instance) the Lessor, its successors or assigns lawfully may immediately, or at any time thereafter and without demand or notice, enter into and upon said premises, or any part thereof, in the name of the whole and repossess the same as of its former estate and expel the Lessee and those claiming through or under it, and remove their effects forcibly, if necessary, without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid, if the Lessor elects so to do this lease shall terminate and the Lessee covenants that in case of such termination it will indemnify and pay the Lessor for all loss of rent and all damages which the Lessor may incur by reason of such termination, during the residue of the period stated herein as the terms of this lease.

VII.

This lease by its terms expires on the 21st day of August, 1919, but it is agreed between the parties hereto that if the Lessee desires to extend the term of this lease for the further period of five years from the expiration of the term hereinbefore stipulated, and shall at least thirty (30) days prior to the date of the expiration of the three (3) year term covered by this lease, serve written notice upon the Lessor of such desire, and shall pay all sums herein required to be paid to the Lessor, and perform all of the agreements and covenants herein required by it, the Lessee, to be observed and performed up to and including the date of the expiration of the term hereinbefore granted, then and in such event, the Lessor will upon such request of the Lessee, extend this lease for a period of five (5) years immediately succeeding the term covered by this lease; and upon such extension being granted all the terms, conditions obligations and provision of this agreement shall continue and apply as between the parties hereto for such extended period of five (5) years.

VIII.

This agreement shall be binding upon the parties hereto and their respective successors and assigns, but by entering into this stipulation

in this contract the Lessor does not waive any of the provisions hereinbefore contained, restraining the Lessee from assigning, subletting and granting to others the right to use said premises or any part thereof, but said provisions in said lease shall continue in full force and effect.

In witness whereof, The parties hereto have caused this instrument to be executed in duplicate by their respective officers, thereunto duly authorized and their corporate seals to be hereunto affixed the day and year first above written.

11 OREGON AND WASHINGTON RAILROAD COMPANY,
By J. D. FARRELL, *President.*

Attest:
A. C. SPENCER,
Assistant Secretary.

J. F. DUTHIE & COMPANY,
By C. D. BOWLES, *President.*

Attest:
W. R. BOWLES,
Secretary.

Approved:
J. W. MORROW,
Tax & Right of Way Agent, 8-24-16.

Approved as to Form:
A. C. SPENCER,
General Attorney, 9-15-16.

12 STATE OF WASHINGTON,
County of King, ss:

On this 23d day of August, A. D. 1916, before me personally appeared C. D. Bowles and W. R. Bowles to me known to be the President and Secretary respectively of J. F. Duthie & Company, the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed thereto is the corporate seal of said corporation.

In witness whereof, I have hereto set my hand affixed by official seal the day and year in this certificate above written.

W. J. HARNED,
Notary Public for the State of Washington,
Residing at Seattle Therein.

My commission expires March 1, 1919.

STATE OF OREGON,
County of Multnomah, ss:

On this 22d day of September A. D. 1916, before me personally appeared J. D. Farrell and A. C. Spencer, to me known to be the President and Assistant Secretary respectively of the Oregon and Washington Railroad Company, the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed thereto is the corporate seal of said corporation.

In witness whereof, I have hereto set my hand and affixed my official seal the day and year in this certificate above written.

OTTO G. STOWELL,
Notary Public for Oregon.

My commission expires October 16, 1916.

13 The Secretary submitted to the meeting draft of contract dated August 22, 1916, proposed by Oregon and Washington Railroad Company, for execution by this company, covering occupancy and use of land described, being a part of Block 393, Seattle Tide Lands, situate in the City of Seattle, King County, Washington, together with improvements to be constructed thereon, for a period of three (3) years from and after August 22, 1916.

Upon motion duly seconded, it was unanimously

Resolved, that this company enter into said contract and the proper officers of this company be, and they are hereby directed to execute said agreement in the name of and on behalf of this company as of the 22d day of August, 1916.

STATE OF WASHINGTON,
County of King, ss:

I, W. R. Bowles, hereby certify that I am Secretary of the J. F. Duthie & Company, a Washington corporation, and that the foregoing is a full, true, and correct copy of a resolution passed by the Board of Directors of said J. F. Duthie & Company at a meeting duly called and held at the office of said J. F. Duthie & Company at its principal place of business on the 22d day of August, 1916, at which a quorum for the transaction of business was present.

In witness whereof, I have hereunto set my hand and affixed the corporate seal of said J. F. Duthie & Company this 22d day of August, 1916.

W. R. BOWLES,
Secretary.

14 EXHIBIT "B."

This Indenture Made This 23rd Day of November, 1916, by and between the Port Commission of the Port of Seattle and J. F. Duthie & Company, a corporation, hereinafter termed the Permittee, Witnesseth:

That Whereas, The Permittee heretofore, on the 4th day of October, 1916, made application to the Port Commission of the Port of Seattle for a permit to use a portion of the waterway situate in the Port of Seattle, hereinafter described; and it appearing that the owner of the tide lands upon which said waterway area abuts, has failed to make application as provided for under Act of Legislature approved March 22, 1913, entitled, "An Act permitting and regulating the use of the waterway areas between the boundaries thereof and Government pierhead lines and providing for the disposition of receipts therefrom"; and it appearing to the Port Commission that the said J. F. Duthie & Company is entitled to a permit for the use of the waterway hereinafter described;

Now Therefore, the Port Commission does hereby grant unto the Permittee a permit to use the following described property situate in the Port District of the Port of Seattle, and being a part of the East Waterway situate in front of Lots Six (6) to Fifteen (15) inclusive of Block 393 of Seattle Tide Lands. The portion of the waterway, the use of which is so granted being more particularly described as follows, to wit:

Beginning at the intersection of the southerly margin of West Hanford Street and the West margin of the East Waterway; thence south four hundred seventy and twenty-eight hundredths (470.28) feet to the true point of beginning; thence south along the west margin of the East Waterway seven hundred sixty-three (763) feet; thence east one hundred twenty-five (125) feet to pierhead
15 line; thence north along pierhead line eight hundred eighty-eight (888) feet; thence south forty-five (45) degrees west one hundred seventy-six and seven hundred seventy-seven thousandths (176.777) feet to point of beginning, containing 103,250 square feet; for the term of three (3) years from the 1st day of September, 1916, said date being taken as the date of the commencement of this permit.

This permit is granted in consideration of the covenants and stipulations herein contained, and the sum of Seventeen Hundred and Twenty-eight and ninety-six one-hundredths ($1,728.96) dollars rental to be paid by the Permittee for the use of said waterway area for the said period of three years. Of which amount, the sum of $1,152.64 has been paid in advance upon the delivery of this permit, said payment being made by the Permittee to the State Treasurer; the balance to be paid to the State Treasurer as follows: $288.16 on the 1st day of September, 1917, and $288.16 to be paid on the first day of September, 1918, the above payments to be remitted to the State Treasurer through the Auditor of the Port Commission.

The Permittee covenants to give and keep in force during the term

of this lease, the bond required by the said Act of Legislature in the penal sum of Five hundred ($500) dollars.

The Permittee covenants not to make or suffer to be made any artificial filling in any of said area or any deposit of rock, earth, ballast, refuse, garbage or other material within such area except such as may have been previously approved in writing by the Port Commission.

It is a condition of this permit that the area herein described, shall be improved according to the plans accompanying and attached to the Permittee's application for this permit, filed in the office of the Port Commission October 5, 1916, and numbered 41, so far as the same are embraced within the area above described, which plans, the Port Commission hereby approves.

The Permittee agrees to complete the improvement according to said plans on or before the 1st day of January, 1917, unless the time for completion shall be hereafter extended by resolution of the Port Commission. The character of said improvements may be changed either before or after the completion by the consent in writing of the Commission.

It is mutually covenanted as follows:

(1) Nothing herein contained shall confer upon, create or recognize in the Permittee any right or privilege in or to any strip of waterway abutting any street and between the prolongations of the lines of such street and the control of and right to use such strip is hereby reserved and recognized to be in the Port of Seattle. It is understood, however, that the foregoing does not apply to the extension of Missouri Avenue, said Missouri Avenue not extending into and across said waterway area at right angles thereto but extending to the waterway area from the end longitudinally.

(2) The Port Commission shall have power on sixty (60) days' notice to cancel this permit for a substantial breach by the Permittee of any of the conditions herein or for lack of bond as herein required.

(3) The Permittee hereby waives any claim for damage which may occur to these improvements by reason of dredging to a depth of minus 52 city datum and with the necessary slopes of the fairway established by Resolution No. 143 of the Port Commission.

Executed in duplicate the date herein first named.

PORT COMMISSION OF THE PORT OF SEATTLE,
By ROBERT BRIDGES,
President of the Port of Seattle.

Attest:
C. E. SEMSBERG,
Secretary of the Port Commission of the Port of Seattle.

J. F. DUTHIE & COMPANY,
By C. D. BOWLES, *President.*

Attest:
W. R. BOWLES, *Secretary.*

Filed in Clerk's Office, Jan. 6, 1917. W. K. Sickels, Clerk, by F. W. Smith.

17 In the Superior Court of the State of Washington for King County.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Affidavit of Service.

STATE OF WASHINGTON,
County of King, ss:

C. E. Bodle, being first duly sworn, on oath deposes and says: That he is now and at all times herein mentioned was a resident of the State of Washington, over the age of twenty-one years, competent to testify in the above entitled action, and not a party thereto.

That on the 22d day of December, 1916, in the City of Seattle, King County, Washington, affiant served summons and complaint in the above entitled action upon the defendant J. F. Duthie & Company, a corporation, by personally delivering to and leaving with J. F. Duthie, manager of said defendant J. F. Duthie & Company, a true copy of the summons herein and hereto attached, together with a true copy of the complaint in said action.

That on the 26th day of December, 1916, in the City of Seattle, King County, Washington, affiant served summons and complaint in the above entitled action upon the defendant Oregon & Washington Railroad Company, a corporation, by personally delivering to and leaving with C. P. Bissett, agent of said Oregon & Washing-
18 ton Railroad Company, in the State of Washington, a true copy of the summons herein and hereto attached, together with a true copy of the complaint in said action.

C. E. BODLE.

Subscribed and sworn to before me this 2d day of January, 1917.

C. J. FRANCE,
Notary Public in and for the State of Washington, Residing at Seattle.

19 In the Superior Court of the State of Washington for King County.

No. —.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Summons.

The State of Washington to the Defendants, Oregon & Washington Railroad Company, a Corporation, and J. F. Duthie & Company, a Corporation:

You and each of you are hereby summoned to appear within twenty (20) days after the service of this summons upon you, exclusive of the date of service, and defend the above entitled action in the above entitled court, and serve a copy of your answer upon the undersigned attorney for plaintiff, at his office address below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which will be filed with the clerk of the above entitled court, a copy of which is herewith served upon you.

C. J. FRANCE,
Attorney for Plaintiff.

Post Office and Office Address: 436-439 Burke Building, Seattle, King County, Washington.

Filed in Clerk's Office, Jan. 6, 1917. W. K. Sickels, Clerk, by F. W. Smith, Deputy.

20 In the Superior Court of the State of Washington in and for the County of King.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Petition of Oregon & Washington Railroad Company for Removal.

To the Honorable Superior Court of the State of Washington in and for King County:

Your petitioner, Oregon & Washington Railroad Company, one of the defendants above named, respectfully shows:

I.

That this is a suit of a civil nature and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

II.

That the plaintiff, Port of Seattle, was at the time of the commencement of this suit, and still is a municipal corporation organized and existing under and by virtue of the laws of the State of Washington and of no other state, territory or nation; and said Port of Seattle was at the time of the commencement of this suit and still is a citizen of the State of Washington and of no other state, territory of nation.

21 III.

That the defendant, J. F. Duthie & Company, was at the time of the commencement of this suit and still is a corporation organized and existing under and by virtue of the laws of the State of Washington and of no other state, territory or nation; and said J. F. Duthie & Company was at the time of the commencement of this suit and still is a citizen of the State of Washington and of no other state, territory or nation.

IV.

That your petitioner, Oregon & Washington Railroad Company, was at the time of the commencement of this suit and still is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and of no other state, territory or nation; and said Oregon & Washington Railroad Company, was at the time of the commencement of this suit and still is a citizen of the State of Oregon, and of no other state, territory, or nation.

V.

That the matter in dispute solely concerns the respective rights of the plaintiff, Port of Seattle, and the defendant, Oregon & Washington Railroad Company, over and in certain navigable waters of the State of Washington; and the controversy in this suit is wholly between said plaintiff and said defendant, citizens of different states, and can be fully determined as between them.

VI.

That the defendant, J. F. Duthie & Company, is not a necessary party defendant to this suit.

VII.

That the time has not elapsed wherein your petitioner is required by the laws of the state of Washington or the rules of this Honorable Court to answer or plead to the complaint of the plaintiff.

22

VIII.

That your petitioner offers herewith its bond, with good and sufficient surety, for its entering in the District Court of the United States for the Western District of Washington, Northern Division, within thirty (30) days from the date of filing this petition, a certified copy of the record in this suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto.

Wherefore, Your petitioner prays that said bond be accepted and that said suit be removed to the District Court of the United States for the Western District of Washington, Northern Division, and that this court proceed no further therein.

OREGON & WASHINGTON RAILROAD COMPANY,
BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Petitioner.

23 STATE OF WASHINGTON,
County of King, ss:

W. H. Bogle, being first duly sworn according to law, does depose and say: That he is agent and attorney for the Oregon & Washington Railroad Company, petitioner above named, and authorized to make

this verification in its behalf; that he has read the foregoing petition, knows the contents thereof and believes the same to be true.

W. H. BOGLE,
Agent and Attorney for Petitioner.

Sworn and subscribed before me this 12th day of January, 1917.

[SEAL OF NOTARY.] CHARLES H. PAUL,
Notary Public in and for the State of Washington, Residing at Seattle.

Filed in Clerk's Office, Jan. 13, 1917. Percy F. Thomas, Clerk, by A. N. Olson, Deputy.

24 In the Superior Court of the State of Washington for King County.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Order Granting Petition for Removal.

The defendant, Oregon and Washington Railroad Company, having presented its petition for removal of this cause to the District Court of the United States for the Western District of Washington, Northern Division, which is in due form; and having filed herewith its bond with National Surety Company of New York, as surety, which bond and surety are satisfactory and are approved by this court;

Now, therefore, The prayer of said petition is granted and it is ordered that the record in this cause be removed into the District Court of the United States for the Western District of Washington, Northern Division, in conformity to the law in such case made and provided.

Done in open court this 13th day of January, 1917.

KING DYKEMAN,
Judge.

Filed in Clerk's Office, Jan. 13, 1917. Percy F. Thomas, Clerk, by A. N. Olson, Deputy.

25 In the Superior Court of the State of Washington in and for the County of King.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Notice of Presenting Petition and Bond for Removal.

Please take notice that the Oregon & Washington Railroad Company, one of the defendants above named will on Saturday the 13th day of January, 1917, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, present to the above entitled court its petition and bond for removal of the above entitled cause to the District Court of the United States for the Western District of Washington, Northern Division; copies of which petition and bond are handed you herewith.

Dated this 12th day of January, 1917.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Petitioner.

To C. J. France, Attorney for Plaintiff.

Due service of the inclosed Notice admitted and a true copy received this day of 12th Jan. 1917.

C. J. FRANCE,
Attorneys for Port of Seattle.

Filed in Clerk's Office, Jan. 13, 1917. Perry F. Thomas, Clerk, by A. N. Olson, Deputy.

26 In the Superior Court of the State of Washington in and for the County of King.

No. 120,010.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Bond on Removal.

Know all men by these presents: That we, Oregon & Washington Railroad Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto the Port of

Seattle, in the penal sum of $1,000.00, lawful money of the United States, for the payment of which sum well and truly to be made, we and each of us bind ourselves and our successors, jointly and severally, firmly by these presents.

Upon these conditions, nevertheless: That whereas the said Oregon & Washington Railroad Company has petitioned the Superior Court of the State of Washington in and for King County for the removal of a certain suit therein pending, wherein the said Port of Seattle is plaintiff and the said Oregon & Washington Railroad Company is one of the defendants, to the District Court of the United States for the Western District of Washington, Northern Division;

Now, if the said Oregon & Washington Railroad Company shall enter in said District Court of the United States, within thirty (30) days from the date of filing said petition, and shall pay all costs that may be awarded by the said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof the parties hereto have set their hands and seals, at Seattle, Washington, this 12th day of January,
27 1917.

OREGON & WASHINGTON RAILROAD COMPANY,
By W. H. BOGLE,
Its Agent and Attorney.
NATIONAL SURETY COMPANY,
J. W. MAXWELL,
Resident Vice President.
E. P. WELCH,
Resident Assistant Secretary.

Approved: This 13th day of January, 1917.
KING DYKEMAN, *Judge.*

Filed in Clerk's Office, Jan. 13, 1917. Percy F. Thomas, Clerk, by A. N. Olson, Deputy.

STATE OF WASHINGTON,
County of King, ss:

I, Percy F. Thomas, County Clerk of King County, and ex-officio Clerk of the Superior Court of the State of Washington, in and for the County of King, do hereby certify that the foregoing is a full, true and correct transcript of the entire files and record in cause No. 120,010, Port of Seattle, a municipal corporation vs. Oregon & Washington Railroad Company, a corporation, and J. F. Duthie & Company, a corporation, as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 1st day of Feb., A. D. 1917.

[SEAL.] PERCY F. THOMAS,
County Clerk,
By A. N. OLSON,
Deputy Clerk.

Indorsed: Record on removal from the Superior Court of the State of Washington, in and for the County of King, to the United States District Court, for the Western District of Washington, Northern Division. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 2, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Deputy.

28 United States District Court, Western District of Washington, Northern Division.

No. 118-E.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Motion of Defendant Oregon & Washington R. R. Co. to Strike Impertinent Matter.

Now comes the defendant, Oregon & Washington Railroad Company, a corporation, by its attorneys, Messrs. Bogle, Graves, Merritt & Bogle, and moves the court to strike from the bill of complaint of the Port of Seattle all of paragraph VI thereof for the reason that the allegations therein contained are not pertinent to any issue made or tendered.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant Oregon & Washington R. R. Co.

Service of within Motion this 3d day of Feb., 1917, and receipt of a copy thereof, admitted.

C. J. FRANCE,
Attorney for Plff.

Indorsed: Motion of Defendant, Oregon & Washington R. Co. to strike Impertinent Matter. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 5, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Clerk.

29 United States District Court, Western District of Washington, Northern Division.

No. 118-E.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Motion to Remand.

Comes now the plaintiff and moves the court to remand the above entitled cause to the State court, from whence it was removed, for trial, for the following reasons:

1. Because, as appears from the records and files herein, the amount in controversy in said action does not exceed the sum of Three thousand dollars ($3,000.00).

2. Because the said defendant J. F. Duthie & Company is a corporation organized and existing under and by virtue of the laws of the State of Washington, and said defendant is therefore a resident and citizen of the State of Washington, being the same State as that of the plaintiff herein, and that said defendant J. F. Duthie & Company is a material, indispensable and necessary party to the disposition of said cause, and that there is involved in this suit no separable controversy which is wholly between citizens of one state on the one hand and citizens of the state of Washington on the other, all of which facts are apparent from the record of this case and the affidavit of R. S. Terhune, one of the attorneys for the defendant J. F. Duthie & Company, hereto attached.

30 3. Because the State of Washington is the real party in interest as plaintiff in this action, the nominal plaintiff, the Port of Seattle, a municipal corporation, being merely the agent and representative of the State of Washington in the granting of permits or leases of waterway areas and harbor areas within said Port District; and the State of Washington being the real party in interest, said cause is not within the jurisdiction of the above entitled District Court of the United States.

Wherefore, Plaintiff says that this court has no jurisdiction to try and determine the above entitled cause, and prays that the same may be remanded to the Superior Court of the State of Washington in and for King County, from whence it came.

C. J. FRANCE,
Attorney for Plaintiff.

31 United States District Court, Western District of Washington, Northern Division.

No. —.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Affidavit of R. S. Terhune in Support of Motion to Remand.

STATE OF WASHINGTON,
County of King, ss:

R. S. Terhune, being first duly sworn, on oath deposes and says: That he is one of the attorneys for J. F. Duthie & Company in the above entitled action. That the said J. F. Duthie & Company is a corporation organized and existing under and by virtue of the laws of the State of Washington and is doing business wholly within said state, its principal place of business being in the city of Seattle, King County, Washington.

That said defendant J. F. Duthie & Company has a material interest in said action for the reason that it is now occupying the waterway area which is the subject matter of this controversy, under a permit from the Port District of the Port of Seattle, and is paying to the State of Washington, as appears from the record herein, a rental for said area of Two hundred eighty-eight and 16/100 dollars ($288.16) a year, and in consequence said defendant is materially interested in the subject matter of this controversy and the disposition thereof.

R. S. TERHUNE.

Subscribed and sworn to before me this 19th day of April, 1917.

[SEAL.] C. J. FRANCE,
Notary Public in and for the State of Washington, Residing at Seattle.

32 Copy of within Motion to Remand received and due service of same acknowledged this 20th day of April, 1917.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorney- for O. W. R. Co.

Indorsed: Motion to Remand. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 20, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Deputy.

33 United States District Court, Western District of Washington, Northern Division.

No. 118-E.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Filed May 7, 1917.

On Motion to Remand. Motion Denied.

C. J. France, for Plaintiff.
Bogle, Graves, Merritt & Bogle, for Moving Defendant.

NETERER, *District Judge:*

The Seattle Port Commission has filed a bill of complaint against the defendants, in which it seeks to enjoin the defendant Oregon & Washington Railroad Company from exercising any jurisdiction over a certain waterway abutting upon property in Seattle described in the bill of complaint, and also a plea directing that the Oregon & Washington Railroad Company reform a certain lease executed to J. F. Duthie Company covering certain tidelands, and for certain accounting between the defendant companies. Petition for removal is filed by the defendant Oregon & Washington Railroad Company on the ground of diverse citizenship and separable controversy, alleging that the amount involved is in excess of $3,000.00. It is contended on the part of the plaintiff that Duthie & Company is a Washington corporation, and hence the cause is not removable on the ground of diverse citizenship. It is also contended that the rental value of the
34 land involved as shown by the lease attached to the complaint and made a part thereof, is $1,728.96, and further that the State of Washington is a real party in interest in that it reserved interest in tidelands, pursuant to the provisions of Chapter 168, Laws Washington, 1913, and that it has legislated with relation to the use of water areas between the boundaries thereof and Government pier lines, and provided for disposition of receipts therefrom. The moving defendant contends that the amount involved is in excess of $3,000.00 and no issue being taken to the allegations of the petition for removal, that must be conceded, and likewise that there is a separable controversy that is disclosed by the face of the complaint, and that Duthie & Company is not a real party in interest, and further that the State of Washington is not a party to this proceeding, nor is it the real party in interest.

There is nothing disclosed upon the face of the complaint or the petition for removal which would indicate to the court any interest in the controversy on the part of the State of Washington, but on

argument the court's attention was called to Session Laws 1913, supra, and the thought emphasized that the entire control of the waterway and the lands in dispute is in the state, and such being the fact that the State is the real party in interest. On page 584 Laws 1913, supra, it is provided:

"In any case where such waterway shall be within the territorial limits of the Port District given under the laws of the State of Washington, the duties herein assigned to the State Land Commissioner shall be exercised by the Port Commission of such Port District, and in every case the rentals received shall be disposed of as follows * * * ",

and then provides that 75 per cent. shall be paid to the County Treasurer in which the District is situated and 25 per cent. to the State Treasurer. It further provides that:

35 "Nothing herein contained shall confer upon, create or recognize in any abutting owner any right or privilege in or to any strip of waterway abutting any street and between prolongations of the lines of such streets, but the control of right to use such strip is hereby reserved to the State of Washington, except that in cases situated in a Port District such control and use shall vest in such Port District."

From an examination of the act I think it is apparent that it was the intent and purpose of the State that all interest of the State was vested in the Port District, and hence the State, so far as the issue here is concerned, is not a party in interest.

I think there is a separable controversy. I do not think that Duthie & Company is a real party in interest. Whatever interest Duthie & Company asserted by reason of the lease from the Oregon & Washington Railroad Company was surrendered to the Port of Seattle by attorning to it in the execution of the lease with the Port of Seattle. All of the rights which the Port of Seattle could hope to obtain from Duthie & Company by decree of the court already are vested in it by the operation of the lease executed voluntarily by the said defendants. Hence the defendant Duthie & Company is not a party in interest to determine the issue between the Port of Seattle and the defendant Oregon & Washington Railroad Company. If an accounting is necessary between the Oregon & Washington Railroad Company and Duthie & Company, that is a concern of theirs and not of the Port of Seattle; nor is the court concerned about that in this case. The amount involved the court must find to be in excess of $3,000.00. The rental value of the property in dispute for three years is not the criterion of the value of the property. The object of the prayer of the complainant is not to enjoin the defendant from exercising acts of ownership over the land in dispute

36 for the period of the lease, but forever. Hence, in view of the allegations of the petition for removal as to value, the court must find that the value is such as to bring it within the jurisdiction of this court.

The motion to remand is denied.

JEREMIAH NETERER,
Judge.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

37 United States District Court, Western District of Washington, Northern Division.

No. 118-E.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Order Denying Motion to Remand.

This cause having come on to be heard on the 7th day of May, 1917, upon plaintiff's motion to remand to the State Court and and having been argued by counsel, the court being advised in the premises, upon consideration thereof, it is ordered that said motion be and it is hereby denied. Plaintiff excepts and an exception is allowed.

Done in open court this 9th day of May, 1917.

JEREMIAH NETERER,
Judge.

O. K. as to form—
C. J. FRANCE.

Indorsed: Order Denying Motion to Remand. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 9, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

38 United States District Court, Western District of Washington, Northern Division.

No. 118-E.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Order Granting Motion to Strike.

This cause having come on to be heard upon the defendant Oregon & Washington Railroad Company's motion to strike Paragraph VI of the plaintiff's bill of complaint, and having been argued by counsel and the court being advised in the premises;

It is ordered that said motion be granted;

And it is further ordered that the plaintiff be given leave to file an amended bill or to stand upon its present bill and this order and that the defendant, Oregon & Washington Railroad Company be given ten days within which to answer the bill or amended bill after the plaintiff shall have signified its intention to stand upon its present bill and this order or shall have served its amended bill.

Plaintiff excepts and its exception is allowed.

Done in open court this 22d day of May, 1917.

JEREMIAH NETERER,
Judge.

Form O. K.
C. J. F.

Indorsed: Order Granting Motion to Strike. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 22, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

39 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Answer of Oregon & Washington Railroad Company.

The Oregon & Washington Railroad Company, one of the defendants above named, answering the bill of complaint of the Port of Seattle, says:

I.

That this defendant admits the allegations contained in paragraphs I, II and III of said bill of complaint.

II.

That this defendant admits the allegations contained in paragraph IV of said bill of complaint, saving and excepting the allegations that the waterway area therein described is within the jurisdiction of the plaintiff and that this defendant has no right, title or interest therein, which allegations this defendant denies.

III.

And this defendant avers that the waterway mentioned in
40 paragraph IV of the bill of complaint was laid out and established by the Board of Harbor Line Commissioners of the State of Washington pursuant to an Act of the Legislature of said State entitled: "An Act to establish and define public ways for water craft across the tide flats within, in front of, and for a mile either way from all incorporated cities and towns in the State of Washington," approved March 28, 1890, through, over and across certain tide lands then owned by the State of Washington situate within, in front of, and for a mile on either side of the City of Seattle, in King County in said State, to the width of 1000 feet, commencing at the deep waters of Elliott Bay and extending inland across said tide lands a great distance, and thereafter, on or about March 15, 1895, a plat thereof, together with the surrounding tide lands—which include the lands described in the bill of complaint and now owned by this defendant—was made and filed by said Board with the Secretary of State, with the Commissioner of Public Lands of the State, in the office of the chairman of said board and in the office of the Auditor of King County; that there was established by said board, and shown on said plat as filed and recorded, a line designated thereon "Pier Head Line," located within the limits of said waterway, parallel with the 125 feet distant from the shoreline on each side thereof, and said "Pier Head Line" has been adopted by the War Department of the United States as prescribing the limits beyond which structures obstructing navigation will not be permitted in said waterway; that said waterway was caused to be excavated by the State of Washington pursuant to an Act of the Legislature of said State entitled: "An Act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands
41 belonging to the state, granting rights of way across lands belonging to the state," approved March 9, 1893, and said waterway thereupon became by virtue of said Act of 1890 and said Act of 1893, and the plats filed and the things done in pursuance thereof, a public waterway, forever reserved from sale or lease as a public way for water craft, and free to all citizens upon equal terms, subject only to the jurisdiction of the proper authorities to regulate navigation therein; that the tide lands through which said waterway was created and established—all of which were owned by the State of Washington—were platted into blocks and lots abutting upon said waterway by said Commission, and the lots described in the bill of complaint were accordingly shown upon the aforesaid official plat as abutting upon said waterway on the west; and that, thereafter, said tide lands, including the lots described in the bill of complaint, together with the appurtenances, were sold by the State of Washington to various and sundry persons, and this defendant, in good faith and for a valuable consideration, by mesne

conveyances became the owner of the lots described in the bill of complaint, together with the appurtenances and hereditaments thereunto appertaining, prior to the year 1913, to wit, in the year 1910.

IV.

And this defendant further avers that the jurisdiction claimed by the port of Seattle over said waterway in paragraph IV of its bill of complaint is based upon an Act of the Legislature of the State of Washington entitled: "An Act permitting and regulating the use of waterway areas between the boundaries thereof and government pierhead lines and providing for the disposition of receipts
42 therefrom," approved March 22, 1913, which by its terms purports to prohibit the erection of any structures in the waterway area of certain waterways—of which the waterway described in the bill of complaint and hereinbefore referred to is one—wherein the waterway area is between the boundaries of the waterway as established by the State of Washington and the pier head line shown upon the official plat hereinbefore referred to—except by permission of the State Land Commissioner, or the Port Commission, when such area is within the territorial limits of a port district—as is the area above referred to,—and upon the terms therein provided; but which act, in truth, provides for the leasing of such waterway areas, and particularly the waterway area above referred to, for a term of years and for a rental therein described.

V.

And this defendant further avers that the lands described in the bill of complaint were acquired by it in reliance upon the permanent continuance of the waterway created as hereinbefore set out, and are chiefly valuable because of their accessibility to said waterway and through it to the waters beyond and because of the riparian and shore rights appurtenant thereto, and that the acts and things done on the part of the State of Washington in creating and establishing said waterway, and the declarations in the above mentioned Acts of its legislatures contained, make and constitute a contract between said state and this defendant and all other purchasers of property abutting thereon that said waterway or any part thereof would never be sold, leased, or otherwise disposed of; and this defendant avers that the Act approved March 22, 1913, above referred to, impairs the obligation of that contract, in violation of Section 10, Article I of the Constitution of the United States
43 and Section 23, Article I of the Constitution of the State of Washington.

VI.

And this defendant further avers that the lands abutting upon said waterway, of which are the lands of this defendant, as herein-

before set forth, are chiefly valuable by reason of their accessibility to said waterway and through it to the waters of Elliot Bay and Puget Sound beyond; that the right to navigate said waterway includes the right to come to, to land upon and to leave the shores abutting thereon, in the interest of commerce, not only to the abutting owners but to the public who may have business and occupation with them or through them with each other, and as well the right to construct wharves, docks and piers, on the shores of and extending into said waterway in aid and promotion of navigation and commerce, provided they do not extend beyond the pier head lines established and adopted as hereinbefore referred to, subject only to proper and reasonable control and regulation by the State of Washington and the United States in the public interest; and this defendant avers that the Act approved March 22, 1913, hereinbefore referred to, and the right or claim asserted by the Port of Seattle thereunder to lease the waterway area hereinbefore described for wharves and docks, and to collect, receive and enjoy the rentals therefrom, and to deny to and deprive this defendant of the right to construct such wharves and docks, or to lease said area for such proper purposes and to receive and enjoy the rentals therefrom, deprives it of these rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Section 3, Article I of the Constitution of the State of Washington.

44 Having this made full answer to all the matters and things contained in the bill of complaint, this defendant prays to be dismissed with its costs in this behalf incurred.

W. H. BOGLE,
BOGLE, GRAVES, MERRITT & BOGLE,
Solicitors and Attorneys for Defendant Oregon & Washington Railroad Company.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

W. H. Bogle, being first duly sworn, on oath does depose and say: That he is Agent and Attorney for the Oregon & Washington Railroad Company, on whose behalf the foregoing answer is made; that he has read the same, knows the contents thereof and believes the same to be true.

W. H. BOGLE.

Subscribed and sworn to before me this 15th day of June, 1917.

EUGENE C. LUCCOCK,
[SEAL.] *Notary Public in and for the State of Washington, Residing at Seattle.*

Service of within answer this 15th day of June, 1917, and receipt of a copy thereof, admitted.

C. J. FRANCE,
Attorney for Plaintiff.

Indorsed: Answer of Oregon & Washington Railroad Company. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 18, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

45 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Election of Plaintiff to Stand Upon its Complaint.

The court having heretofore entered an order striking Paragraph VI of plaintiff's bill of complaint, and said order having provided that the defendant Oregon & Washington Railroad Company should have ten days within which to answer the bill or amended bill, after the plaintiff shall have signified its intention to stand upon its present bill.

The plaintiff herein does hereby elect to stand upon its present bill of complaint.

Dated this 18th day of June, 1917.

C. J. FRANCE,
Attorney for Plaintiff.

Copy of within Election of Plaintiff received and due service of same acknowledged this 18th day of June, 1917.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Deft. Oregon & Wash. R. Co.

Indorsed: Election of Plaintiff to Stand upon its Complaint. Filed in the U. S. District Court, Western Dist. of Washington Northern Division, June 20, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

46 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Answer of Defendant J. F. Duthie & Co.

Comes now J. F. Duthie & Co., a corporation, one of the defendants in the above entitled action, and answering the complaint of the above named plaintiff, says:

I.

This defendant admits the allegations contained in paragraphs I, II, III, V and VI of said complaint.

II.

This defendant admits the allegations contained in paragraph IV of said complaint, with the exception of the allegations that the waterway area therein described is within the jurisdiction of the plaintiff, and that the defendant Oregon & Washington Railroad Company has no right, title or interest in said waterway area by the Oregon & Washington Railroad Company or by the defendant Duthie & Co., claiming under said Oregon & Washington Railroad Company, is wholly unfounded, which allegations this defendant states that it has no knowledge or information sufficient to form a belief as to their truth or falsity and therefore
47 denies same, and requires plaintiff to prove the truth thereof.

III.

And further answering said complaint, and by way of affirmative matter, this defendant avers that on, to wit, the 22d day of August, 1916, the defendant Oregon & Washington Railroad Company made and executed and thereafter acknowledged and delivered the certain indenture of lease to this defendant mentioned in paragraph III of plaintiff's complaint and attached thereto; that in and by said lease it was contemplated that the lessee would wharf out from said leased premises to the pier head line adopted by the State of Washington and the United States in the waterway in front of said

premises, and would construct improvements upon and develop and use said waterway areas between the east line of said lease premises and the pier head line in front of and parallel to same; that in said lease the said Oregon & Washington Railroad Company refused to assume any obligations with respect to the securing of any permit or permits from state or municipality authority for the wharfing out, construction upon, development of, or use by said lessees J. F. Duthie & Co. of said waterway area between the east line of the leased premises and the pier head line in front of and parallel to same, but required all permits lawfully required for any and all such development, construction and operation, to be secured by said Duthie & Co. at its own costs and expense.

IV.

That at said time the plaintiff Port of Seattle claimed to have jurisdiction over the waterway area between the east line of said leased premises and the pier head line in front of and parallel to the same, as established and adopted by the State of Washington and the United States, as well as the right to construct wharves and other improvements upon and to develop and use said water-
48 way area and to lease said waterway area for wharves, docks and other uses in the aid and promotion of navigation and commerce.

V.

That by reason of the refusal of the defendant Oregon & Washington Railroad Company to assume the obligation to secure any permit or permits from the plaintiff Port of Seattle for the wharfing out, construction upon, development of or use by said Duthie & Co. of said waterway area and the claims of jurisdiction and ownership therein of the plaintiff Port of Seattle, as hereinbefore set forth, this defendant was compelled to and did on or about the 23d of November, 1916, make application to plaintiff Port of Seattle for a permit for the use of said waterway area described in said lease, which said application was on or about said November 23, 1916, granted by said Port of Seattle, and a copy of said permit is set out in paragraph V of said complaint.

VI.

That this defendant has no knowledge as to who is the true owner of or entitled to exercise jurisdiction over said waterway area, and desires to have the rights and equities of the plaintiff and the defendant Oregon & Washington Railroad Company therein legally ascertained and determined, and alleges that it will abide whatever judgment is finally lawfully entered herein.

Wherefore, this defendant prays that the respective rights and equities over said waterway area of the plaintiff and the defendant

Oregon & Washington Railroad Company be legally ascertained and determined, and that it recover its costs herein, and that it have such other and further or different relief as to the court
49 may seem meet and equitable in the premises.

AUST & TERHUNE,
Attorneys and Solicitors for Defendant
J. F. Duthie & Co.

UNITED STATES OF AMERICA,
State of Washington, County of King, ss:

C. D. Bowles, being first duly sworn on oath, deposes and says: That he is President of J. F. Duthie & Co., a corporation, one of the defendants in the above entitled action, and makes this verification upon its behalf; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

C. D. BOWLES.

Subscribed and sworn to before me this 19th day of October, 1917.

R. S. TERHUNE,
Notary Public in and for the State of
[SEAL.] *Washington Residing at Seattle*

Copy of within Answer received and due service of same acknowledged this 19th day of October, 1917.

C. J. FRANCE,
Attorney for Pltf.
BOGLE, GRAVES, MERRITT & BOGLE,
Attys. for Dft. Oregon & Washington R. R. Co.

Indorsed: Answer of Defendant J. F. Duthie & Co. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 20, 1917, Frank L. Crosby, Clerk.

50 United States District Court, Western District of Washington, Northern Division.

No. 118.

PORT OF SEATTLE, a Municipal Corporation, Plaintiff,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

September 9, 1918.

C. J. France, for Plaintiff.
Bogle, Graves, Merritt & Bogle, for Defendant Oregon-Wash. Ry. Co.
Aust & Terhune, for Defendant J. F. Duthie & Co.

NETERER, *District Judge:*

This is an action brought by the plaintiff to enjoin the defendants from asserting or claiming any proprietary interest in what is known as the waterway area in the East Waterway situated in the port district of the City of Seattle. The land owned by the defendant company was originally submerged tide lands and at the time of the adoption of the constitution owned by the State. In 1894 and 1895 the State Board of Land Commissioners, pursuant to law (Laws 1889, 1890 and 1893 adopted and filed a plat of the state owned tide lands, creating the East and West Waterways and establishing a pier headline 250 feet from the "Bulk Headline" and approved contracts for the excavation of said waterways and filling in of the state-owned tide lands in the vicinity thereof; and thereafter the title to the lots in issue passed from the state and through mesne conveyances now rest in the defendant railroad company. The East and West Waterways, thus created, form the outlet of the Duwamish River, a navigable stream. The East Waterway represents one of the original channels at the mouth of said river, the other
51 channel being represented by the West Waterway. The tide lands reclaimed with the material excavated from the East and West Waterways now constitutes a large section of the industrial and business section of the city. These lands lie more than a mile from the original shore line.

The defendant, Oregon & Washington Railroad Company, leased to J. F. Duthie & Company, a corporation, these lots bordering upon the East Waterway for the purpose of establishing a shipyard and therewith leased the right to build into the waterway necessary structures. The waterway is one thousand feet wide, extending from Elliot Bay through the reclaimed tide lands. The plaintiff thereafter, for value, leased to the same company the right to build in the waterway such structures as it required.

The plaintiff contends that the State of Washington has the sole and exclusive proprietary interest in the East and West Waterways, subject only to the right of the United States government to regulate the same in aid of navigation and that the right of the state has been transferred by proper legislative authority to the plaintiff in this case. The defendant disputes the right of the plaintiff to exercise the right of ownership over this area not for the purpose of supervision and regulation, but for revenue and to the destruction of the proprietary rights of the defendant.

I think the claim of the defendant in argument, that the conduct of the plaintiff is in violation of the provisions of Article XV, Section 1, of the Constitution of the State, may be passed for the reason that the issue is not the right of the plaintiff to subject this area to any particular use, but it is the right of the defendant to the particular area which is challenged.

It is conceded that the plaintiff, as the State's agency has governmental power and supervision as will prevent the construction and maintenance of any structure in the waterway that interferes with or obstructs navigation or the proper use of the waterway for commerce and navigation. It is also conceded that the rights of the parties to this proceeding are to be measured by the rules and
52 decisions of the State court. Such, at any rate, I believe to be the law. St. Anthony Falls Water Power Company v. St. Paul Water Commissioners, 168, U. S. 349.

As a basis for the contentions it may be stated that by the provisions of Section 1, Article XVII of the Constitution of Washington, the State asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide, in waters where the tide ebbs and flows and up to and including the line of high water within the banks of all navigable rivers and lakes.

Article XV of the Constitution empowers the legislature to provide for the appointment of a Commission, whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets in the state, wherever such navigable waters lie within or in front of the corporate limits of any city or town or within one mile thereof upon either side.

The same Article, Section 2, provides that the legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures upon the areas mentioned in Section 1, but limits the terms for which they shall be made and grants to municipal corporations the rights to establish streets over intervening tide lands.

The Legislature of 1889 and 1890 created a Board of State Land Commissioners and conferred upon it the power of the Harbor Land Commissioners. It also passed a law (1893) providing for the creation of public waterways across state owned tide lands near cities and towns.

The ownership of the beds of all tide lands is in the state, unless it has been granted away. McCreadie v. Virginia, 94 U. S. 391.

New states, upon admission into the Union, have the same rights as the "original states" in the tide waters and in the lands below high water mark within their respective jurisdictions. Shively v. Bowlby, 152 U. S. 1.

53 By the rules and decisions of the Supreme Court of Washington it would appear that a riparian owner has no proprietary interest below high water mark (1); nor has the owner of littoral lands a right except as a member of the public for the purpose of navigation and fishery (2). At common law there was no easement.

(1) Fisenbach v. Hatfield, 2 Wash. 236; 26 Pac. 539; 12 L. R. A. 632; Pierce v. Kennedy, 2 Wash. 324; 26 Pac. 554; 28 Pac. 35; Baer v. Moran Bros. Co. 2 Wash. 608; 27 Pac. 470; Board of Harbor Line Com'rs. v. State ex rel. Yesler, 2 Wash. 530; 27 Pac. 550; State ex rel. Stimson Mill Co. v. Board of Harbor Line Com'rs, 4 Wash. 6; 29 Pac. 938 State ex rel. Columbia & P. S. R. Co. v. Board of Harbor Line Com'rs. 4 Wash. 816; 30 Pac. 734; Morse v. O'Connell, 7 Wash. 117; 34 Pac. 426; Allen v. Forrest, 8 Wash. 700; 36 Pac. 971; 24 L. R. A. 606; Lownsdale v. Grays Harbor Boom Co. 21 Wash. 542; 58 Pac. 663; Sullivan v. Callvert 27 Wash. 600; 68 Pac. 363; McCue v. Bellingham Bay Water Co. 5 Wash. 156; 31 Pac. 461; Washougal & Lo Camas Transp. Co. v. Dalles etc. Nav. Co. 27 Wash. 490, 68 Pac. 74; Kalez v. Spokane Val. Land etc. Co. 42 Wash. 43; 84 Pac. 395; Van Siclen v. Muir 46 Wash. 38; 89 Pac. 188; Muir v. Johnson, 49 Wash. 66; 94 Pac. 899; Brace & Hergert Mill Co. v. State, 49 Wash. 326; 95 Pac. 278; Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83; 102 Pac. 1041; Lownsdale v. Grays Harbor Boom Co. 84 Wash. 542; 103 Pac. 833; Palmer v. Peterson, 56 Wash. 74; 105 Pac. 179; Bilger v. State, 63 Wash. 457; 116 Pac. 19; Austin v. Bellingham, 69 Wash. 677; 126 Pac. 59; State v. Sturtevant, 76 Wash. 158; 135 Pac. 1035; Commercial Waterway District v. Seattle Factory Sites Co. 76 Wash. 181; 135 Pac. 1042; Newell v. Loeb, 77 Wash. 182; 137 Pac. 811; State ex rel. Ham, Yearsley etc. v. Sup'r Ct., 70 Wash. 442; 126 Pac. 945; Hill v. Newell, 86 Wash. 227; 149 Pac. 951; Washington Boom Co. v. Chehalis Boom Co. 90 Wash. 350; 156 Pac. 24; Puget Mill Co. v. State, 93 Wash. 128; 160 Pac. 310.

(2) Shively v. Bowlby, 152 U. S. 1; Commonwealth v. Alger, 61 Mass. 53, 66, 77; Murphy v. Bullock, 20 R. I. 35, 39; 37 Atl. 348; Providence v. Comstock, 65 Atl. 307; (R. I.); Chapman v. Kimball, 9 Conn. 38; Brookhaven v. Smith, 188 N. Y. 74; 80 N. E. 665; Stevens v. Patterson, etc. R. R. Co. 34 N. J. 532; Naglee v. Ingersoll, 7 Pa. 185; Bailey v. Railroad Co. 4 Harr. 389 (Del.); Day v. Day, 22 Md. 530; French v. Bankhead, 52 Va. 136 (11 Gratt.) Ward v. Willis, 51 N. C. 183; State v. Guano Co., 22 S. C. 50; Johnson v. State, 114 Ga. 790; 40 S. E. 807; State v. Black River etc. 32 Fla. 82; 13 So. 640; State v. Gerbing, 56 Fla. 603 47 So. 353; Turner v. Mobile, 135 Ala. 73; 33 So. 132; Bullock v. Wilson, 2 Port, 436 (Ala.); Martin v. O'Brien, 34 Miss. 21; Galveston v. Heidenskeimer, 63 Tex. 559; Dana v. Wharf Co. 31

Cal. 118; Pacific Elevator Co. v. Portland 65 Ore. 349; 133 Pac. 72 State v. Korrer, 148 N. W. (Minn.) 617; Attorney General v. Smith 109 Wis. 532 85 N. W. 512; Revell v. People, 177 Ill. 468; 52 N. E. 1052; State v. Venice, 160 Mich. 680; 125 N. W. 770; Ryan v. Brown, 18 Mich. 196; Ravenswood v. Fleming, 22 W. Va. 52; State v. Land Co. 158 S. W. 746 (Tenn.); Harrison v. Fite, 148 Fed. 781; State v. Akers 140 P. 637 (Kan.); Tomlin v. D. B. & M. R. Co. 32 Ia. 106; U. S. v. Mackey, 214 Fed. 137; Callahan v. Price, 146 P. 734 right to wharf (3). Such right, when exercised, was by virtue of local legislation or by custom which received local endorsement.

54 While the issue before the court is not to determine the right of the respective parties to this waterway, but the right of the defendant to lease a portion of the waterway for the purpose to which it is devoted, yet I think it may be stated in this connection that Justice Burton, in speaking for the court in U. S. v. Chandler-Dunbar W. P. Co. 229 U. S. 53, stated the rule, at page 64:

The primary use of the waterways and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of the riparian owner in the submerged lands in front of this upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such waters. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

And in Ex parte Easton, 95 U. S. 68, when it said

"Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ship and vessels and watercraft, of every name and description whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are construed to enable ships, vessels and all sorts of water craft to lie in port in safety, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers.

"Piers or wharves are a necessary incident to every well regulated port, without which commerce and navigation would be subjected to great inconvenience, and be exposed to vexatious delay and constant peril."

(3) Shively v. Bowley 152 U. S. 1; Commonwealth v. Alger, 61 Mass. 53; Austin v. R. R. Co. 45 Vt. 215; Providence v. Comstock 65 Atl. 307 (R. I.); Real Estate Co. v. Mackenzie, 82 Atl., 804 (R. I.); Stevens v. Patterson & Newark R. R. Co. 34 N. J. 532; Naglee v. Ingersoll, 7 Pa. 185; Tinicum etc. v. Carter, 61 Pa. 21; Valentine v. White, 2 Gill, 444 Syl. (Md.) Day v. Day 22 Md. 530; France v. Bankhead, 52 Va. 136 (11 Gratt.); State v. Black River Phosphate Co. 32 Fla. 82, 13 So. 640; Martin v. O'Brien,

34 Miss. 21; Dana v. Wharf Co. 31 Cal. 118; Pacific Millings Co. etc. v. Portland 65 Ore. 349, 133 Pac. 72; Eisenbach v. Hartfield 2 Wash. 236; Revell v. People 177 Ill. 468, 52 N. E. 1052; Ryan v. Brown, 18 Mich. 196; Ravenswood v. Fleming, 22 W. Va. 52.

In Illinois Central Railroad Company v. Illinois, 146 U. S. 387 where nearly a thousand acres of wharfage territory along the lake in front of Chicago was claimed by the State, it having been
55 granted to the railway company, the court said, at page 452:

"That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants."

A similar issue was determined in Long Sault Development Co. v. Kennedy, 212 N. Y. 1; 105 N. E. 844. At page 8 the court said:

"The power of the legislature to grant lands under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this Court too often to be open to serious question at this late day. The contemplated use, however, must be reasonable and one which can be fairly said to be for a public benefit or not injurious to the public."

Now the highways of a state, whether on land or by water, shall be best improved for the public good is a matter for state determination, subject always to the right of Congress to interpose in the cases mentioned.

In the case of Morris v. U. S. 174 U. S. 196, speaking of the waterfront of the City of Washington, the court said at page 251:

"As a national city was to be founded * * *, and as the site selected was on a navigable, tide water river, inviting foreign and domestic commerce, we should naturally expect to find the city located in immediate proximity to the river, with public wharves and landings, and with a municipal ownership and control of the streets and avenues leading to and bounding on the stream."

Strictly speaking, the defendant is not a riparian owner. The waterway is artificial, a creature of the state, created out of state-owned tidelands and for the purpose of commercial and industrial development of the city. The original owners of the land on the

shores of Elliott Bay are removed more than a mile from these
56 lands and between the two points are located manufacturing industries, warehouses, city streets with car lines, etc.

In Dana v. Jackson Street Wharf Co., 31 Cal. 118, the Supreme Court held that under such conditions an owner to be not a riparian proprietor in the sense in which that term is used in the law of tide waters.

As to the contention that the Laws of 1913, supra, impair the obligations of a contract, it may be said:

Section 5, Act of 1890, providing that:

"All public ways that may be established under the provision of this act are and shall forever be reserved from sale or lease as public ways for water crafts."

and Laws 1913, supra:

"An act permitting and regulating the use of waterway areas between the boundaries thereof and government Pier Head Lines and providing for the disposition of receipts therefrom;"

and Article XV of the State Constitution, must be construed together. No interest was given to the upland owner by the act of 1890; no right to build a structure into the waterway or to make a lease which would authorize the right to build a structure therein was granted. No private owner would have a right to build a structure in the waterway, whether within or without the Pier Head Line, Section 5, supra, is related to Article 15 of the State Constitution, by which it is specifically provided that the Legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures upon the areas mentioned in Section 1, where reference is made to the location and establishment of the proper lines of navigable courses of all harbors etc., and whether the laws of 1913, supra, attempt to curtail any right of the defendant previously granted it is not necessary to determine.

What has been said, I think, shows that the waterways are "public ways for water craft" and are to be devoted to the aid of commerce and navigation, and that the defendant has no proprietary interest in the waterway, but that it has some interest above that of the public, must follow from the fact that the State—owner of
57 the upland—platted the land, constructed the waterway and sold the land with relation thereto. Accessibility to deep or navigable water gave added value to this land. The Supreme Court of the State, in State v. Sturtevant, 76 Wash. 158, at page 166, said:

"Now, if, in the exercise of its functions, the state sells its shore lands, we may assume that this privilege entered into, and became a part of, the consideration for its deed; so that the state could not, either by its own act or by granting the privilege to another to extend the line of navigation, destroy the substance of its deed * * *"

and the 1913 law, supra, in so far as it contravenes this right, must be held inoperative.

The court also says in the same case, at page 165:

"The right of a * * * shore owner to * * * erect docks and piers, though sometimes denied, is now well settled."

The extent to which the plaintiff may supervise the wharfage privilege; or the toll, if any, it may exact from the defendant, is not before the court. The plaintiff and defendant have each leased for value the land in issue to the same party for the same purpose. Neither has a right to do so. The plaintiff being itself a transgressor must purge itself of fault before it can have standing in a court of equity. The action may be dismissed. No cost to either party.

JEREMIAH NETERER,
Judge.

Indorsed: Decision. Filed in the United States District Court, Western District of Washington, Northern Division, Sep. 9, 1918. F. M. Harshbeger, Clerk. By S. E. Leitch, Deputy.

58 United States District Court, Western District of Washington, Northern Division.

No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, et al., Defendants.

Decree.

This cause having come on to be heard upon the pleadings and the evidence introduced in open court, and arguments of solicitors both on behalf of the complainant and the defendants having been heard, and the cause duly considered, the court finds:

That the complainant has no proprietary rights or interests in the water area between the shore line and the pier-head line in front of the lots owned by the defendant, Oregon & Washington Railroad Company, described in the pleadings herein, and is not entitled to lease the same, nor to deprive the defendant, Oregon & Washington Railroad Company, of access to the navigable waters of said waterway over said water area; and that the provisions of Chapter 169 of the Laww of Washington of 1913, providing for such leasing and collection of revenue therefor, are invalid because the same are in conflict with Section 10, Article I of the Constitution of the United States and with the XIVth Amendment to said Constitution.

That the defendant Oregon & Washington Railroad Company has no proprietary interest in said water area, but as the owner of the abutting lots is entitled to access to and from said lots to and from the

deep or navigable waters of said waterway across said water area, subject to proper Governmental supervision.

59 The court further finds that the State has never established any harbor lines in said waterway, but does not adjudicate upon the right of the State to hereafter establish harbor lines therein or the effect the establishment of such harbor lines would have upon the rights of the parties hereto in such waterway.

The court being of the opinion that complainant is not entitled to any equitable relief herein;

It is ordered and decreed that said bill of complaint be, and the same is, hereby dismissed, without costs to either party.

Ordered and decreed in open court, this 13th day of February, 1919.

JEREMIAH NETERER,
Judge.

Indorsed: Decree. Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 14, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

60 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, et al., Defendants.

Order Entering Exceptions.

Now at the time of the entry of the decree in the above entitled cause, complainant appearing in open court by its attorneys Messrs. Preston, Thorgrimson & Turner, excepts to the entry of the said decree and to every part of the said decree, and specially excepts to the said decree as follows:

1. Complainant excepts to the decree of the court that complainant has no proprietary rights or interest in the water area between the shore line and the pier head line in front of the lots owned by the defendant, Oregon & Washington Railroad Company, described in the pleadings herein.

2. Complainant excepts to the decree of the court that complainant is not entitled to lease the said water area.

3. Complainant excepts to the decree of the court that complainant is not entitled to deprive the defendant, Oregon & Washington Railroad Company, of access to the navigable waters of said waterway over said water area.

4. Complainant excepts to the decree of the court that the provisions of Chapter 169 of the Laws of Washington of 1913, providing for leasing and collection of revenue, are invalid.

5. Complainant excepts to the decree of the court that the defendant, Oregon & Washington Railroad Company, as the owner of the abutting lots, is entitled to access to and from said lots to and from the deep or navigable waters of said waterway across said
61 water area.

6. Complainant excepts to the decree of the court that the state has never established any harbor lines in said waterway.

7. Complainant excepts to the decree of the court that complainant is not entitled to any equitable relief herein.

8. Complainant excepts to the decree of the court dismissing the bill of complaint herein.

It is now by the court ordered that the said exceptions be and the same are now hereby entered of record.

Done in open court this 13th day of February, 1919.

JEREMIAH NETERER,
Judge.

Indorsed: Order Entering Exceptions. Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 14, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

62 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. DUTHIE & COMPANY, a Corporation, Defendants.

Stipulation.

It is now stipulated that the Statement of Evidence now on file in the above entitled court shall be approved and certified by any Judge of the above entitled court, and that notice of the time and place when the same is so to be certified is hereby waived, and that an order may be entered directing the attaching of exhibits thereto as suggested in the notice hereinbefore given by attorneys for complainant relating to said matter and now on file.

It is further stipulated that the amount of security to be given by complainant on appeal to the Supreme Court of the United States may be fixed in the sum of Five hundred dollars ($500.00).

PRESTON, THORGRIMSON & TURNER,
Attorneys for Complainant.
BOGLE, MERRITT & BOGLE,
Attorneys for Defendant
Oregon & Washington Railroad Company.
AUST & TERHUNE,
Attorneys for Defendant
J. F. Duthie & Company.

Indorsed: Stipulation. Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

63 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, et al., Defendants.

Statement of Evidence under Equity Rule 75.

Mr. France, attorney for complainant, renewed his motion to remand the case to the State court, with the understanding that the argument upon the motion to remand should be made at the close of the case.

Upon stipulation of counsel in open court, Exhibit 1 was admitted to evidence, said Exhibit 1 being a map showing the portion of the East Waterway involved in this case and certain portions of the abutting tidelands, accompanied by certificate of the Commissioner of Public Lands.

Testimony of J. D. Blackwell, Witness for Complainant.

I am a civil engineer and have been for twenty-three years. Have resided in Seattle since 1899, and during all that time have been engaged in all classes of engineering work. In the latter part of 1902 I made certain experiments for Will H. Parry, president of the Seattle-Lake Washington Waterway Company, in the handling of dredged material, and from 1902 to the early part of 1904 I was consulting engineer for that company. From 1904, for about a year or a year and a half, I was with the Puget Sound Bridge & Dredging Company, which was doing the dredging on the tide flats in Seattle, and I still retain my interest and work in connection with the tide flat problem. Since 1905 I have been the engineer and superintendent of construction for the Seattle-Lake Washington
64 Waterway Company, doing the filling of these tide-lands. The State of Washington entered into two contracts with Eugene Semple for the dredging of the East and West Waterways, under the Act of March 9th, 1893.

(At this point complainant offered and the court admitted Plaintiff's Exhibit No. 2, being copies of contracts referred to by witness.)

These contracts, Exhibit No. 2, were thereafter assigned to Seattle-Lake Washington Waterway Company which did all of the work

thereunder, and I have been engineer for that company during all the time the work has been in progress, except from 1897 to 1902, during which time there was very little work done, practically all of it being done after 1902.

Plaintiff's Exhibit No. 1 shows a pier head line in the East Waterway 250 feet from the bulkhead or property line. There is, among the original records in the local United States War Office, Engineer's Department, a similar plat showing the same lines and the East Waterway laid out in the same manner with the pier head line 250 feet from the property line, and having upon it an endorsement that the pier head line was approved by the War Department, November 17th, 1894, and a later endorsement that on June 18th, 1914, the pier head line was drawn in to 125 feet instead of 250 feet as formerly approved, and according to that record the 125-foot line would be the established government pier head line as it now exists.

(Complainant at this time, there being no objection, offers and the court receives in evidence Plaintiff's Exhibit 3.)

Exhibit 3 is the index sheet of plats covering the tide-lands as filed in King County. Plaintiff's Exhibit No. 1 shows two or three of these plats put together in one map, but it was impossible to put them all together in one map, so each was divided into a number of
65 sheets, and this general map was made as showing just what territory each of these plats that were filed covered.

At the request of counsel for complainant the witness read from the map the endorsement thereon as follows:

"Volume Two Seattle Tide Lands as surveyed and platted by the Board of Appraisers of tide and shore lands for King County, Washington, 1894-1895. Scale 100 ft. = 1 in. Appraisers Fred W. Sparling, Thos. W. Prosch, D. A. McKenzie. Edward Wheeler, Secretary. M. Stixrud, C. E., Engineer."

Now, there is another note on the margin of the plat, which says:

"We, the undersigned, appraisers of tide and shore lands for King County, Washington, hereby certify that the plats numbered 26 to 56 inclusive in this volume, are of lots, blocks, tracts, alleys, streets, avenues, boulevards, etc., on tide lands of the first class examined, surveyed and platted by us within, in front of and within two miles of the city of Seattle, under Act of the State Legislature approved March 26th, 1890. Fred M. Sparling, D. A. McKenzie, Thos. W. Prosch."

This represents the general scheme of the plat of Seattle Tide Lands, as adopted by the State Land Commissioner. Exhibit No. 3 shows both harbor lines and pierhead lines. There was a dotted line shown here within the waterway area. The harbor lines are shown out in front. The harbor area is the 600 feet that lies between what is called the uplands and deep water. It is an area that is too shallow as a rule to navigate and too deep to wade, so that the government established this line, the pierhead line or outer harbor line, as the line beyond which no structure shall extend into the water.

The East Waterway, as I understand it, only extends to the inner harbor line. The area out beyond that is this fairway and is not private property. The outer harbor line, as shown on Plaintiff's Exhibit 1, outside of the boundaries of the waterway extended, is shown on Plaintiff's Exhibit 3. It is the upper line, just at the northwest corner of sheet 48 and extends southwesterly across the plat
66 of 48 to the easterly margin of the West Waterway, and the harbor area would lie between that line and the inner line or inner harbor line as shown on the same plat. Block 48 is simply one sheet of the atlas and extends away out beyond the outer harbor line, but that does not mean that there is any land out there; it is just simply a continuation of the sheet. The fill on block 48 extends to the inner harbor line, and the same is true of blocks 42 and 52. The harbor line was not established at this time beyond about the center of that sheet in block 52. From there on there was no harbor line established. In the east waterway there are shown pierhead lines, originally 250 feet distant from the shore line, and subsequently drawn back to 125 feet from the shore line, but this extends only up to block 45. The extension of the East Waterway from the northern end of block 45 to the junction with the extension of the West Waterway shows no pierhead lines of any kind. On this plat the Canal Waterway, extending eastward from a point just north of blocks 45 and 37—the plat shows no harbor lines nor pierhead lines. The width of the Canal Waterway is 300 feet. The width of the upper end of the East Waterway from block 45 to the junction of the West Waterway is 400 feet, and neither of those show any pierhead lines or harbor lines.

(At this point complainant offers and the court receives in evidence without objection Plaintiff's Exhibit 4.)

Plaintiff's Exhibit 4 is what is known as Seattle Quadrangle Topographical maps, gotten out by the United States Government. It shows the lines, elevations, streams, lakes, waterways, etc. This is the edition of 1897, reprinted July, 1912.

I have marked upon Exhibit 4, at the mouth of the Duwamish River, a certain area that shows as water, with a red line about it. That represents the area covered by the four contracts of
67 the Seattle-Lake Washington Waterway Company. Those contracts were contracts between the Waterway Company and the State for a filling of the area shown or enclosed in the red lines on this print. The area included within the red lines represents substantially the present plat of the Seattle Tide Lands, and represents the area that was filled in under the four contracts between the State and the Seattle-Lake Washington Waterway Company. Prior to the time the waterways were dredged and the fill made, that was all water at high tide. The East and West Waterways, as shown on this map, divide the area into approximately three parallel strips, one strip, a little more than one-third, lying to the east of our East Waterway, then coming the East Waterway, then approximately a little less than a third lying between the East and West Waterways, then the West Waterway, then the remaining tide lands to the west of the West Waterway; so that it would divide that area shown in

red on that map, approximately into three equal divisions of land, the East and West Waterways occupying two-fifths, as you might express, or two-fifths plus, of the area. The circular area marked in red on Plaintiff's Exhibit 4 was the mouth of the Duwamish River before any improvement was made, which river is shown on the map as a curving stream. Duwamish River, when I came to Seattle, was considered and recognized by the Government as a navigable body of water. There were three channels of the old Duwamish River. The most easterly channel followed along the foot of Beacon Hill, in front of the Bay View Brewery, came north to near the present site of the Northern Pacific and Great Northern Depot, then swung south out into the open water. The second channel came between two of the islands there, in just about where the East Waterway now strikes Spokane Avenue, then flowed northwesterly and out
68 into the open water. The third channel, or the most westerly, flowed along the foot of the hill at West Seattle, known as Pigeon Point, and flowed along very closely and entered the open water not very far from what is now the Novelty Mills, I think, land that is owned by the Northern Pacific Railroad Company, and flowed out into open water there. This last channel was the one that was most generally used by boats going up and down the Duwamish River. In fact, it is the only channel that I ever remember being used by craft of any size going up and down the Duwamish.

The improvement made by the excavation of the waterways substituted what might be called a two-tined fork for a three-tined fork. Thereafter Waterway District No. 1 was created under an act of the State and the Duwamish River straightened and deepened as far as The Meadows, I think a matter of two miles and a half, maybe three.

The lands colored red on the plat are tide lands of Seattle, the greater part of which, if not all were covered at high tide and exposed at low tide. The Duwamish River had a small outlet flowing around to the east, which was not navigable after I came to Seattle. I understood that boats at times went up there, but I never saw it; in fact it was impossible at that time—the only filling that had been done by the Waterway Company was done there in that block. That is all filled land now, and there is no channel at all.

There was a second outlet somewhere near the center of the tide lands, which was not navigable, either, at the time I knew it, and in its natural condition was not navigable water.

The upper or south end of the East Waterway was very nearly the middle line of the fork, as the river formerly existed. Then the channel ran diagonally across what is now Harbor Island,
69 and entered the open channel to the west at the north end of the West Waterway at the present time. The south end of the channel in the width of a thousand feet, up to the Sound, does not correspond with the old channel. When I speak of the Duwamish being a navigable stream in the early days, I refer to the westerly outlet which does not correspond at all closely with the West Waterway. This ground is all filled now, except the two waterways, and all the old channels have been done away with and the East and West Waterways are substituted therefor as mouths of the Duwamish. The East Waterway is not now opened fully through. The Spokane

Avenue bridge has prevented the excavation of the East Waterway through to a connection with the West Waterway to the south of Spokane Avenue. The West Waterway is opened up for traffic clear through to the Duwamish proper. Some of the waters of the Duwamish River came down through the East Waterway. The East Waterway is not navigable south of Spokane except for a row boat or a very small launch, but it is not for ships.

(Complainant offers Exhibit 5 in evidence and the same is admitted by the court without objection.)

Exhibit 5 represents the plat of the lands lying around and adjacent to Elliott Bay. The area shown in red is the outline of the area covered by the four contracts between the state and the Seattle-Lake Washington Waterway Company. It also shows the area in which all of our filling has been done. We have substantially—or, that is, the Waterway Company has substantially filled the area shown in red on this plat, with the exceptions that along the foot of Beacon Hill, from Massachusetts Street south to Bay View Street, there is a strip in there that was never filled, and to the west of
Twenty-sixth Avenue South, or to the west of the center line
70 of Twenty-sixth Avenue South, that has never been filled, that is, a little strip to the west of Twenty-sixth Avenue South that has not been filled, and the area over in near the foot of Beacon Hill has not been filled, and there is a south area, clear to the south end, down here south of Dakota Street, that has not been filled. The rest has all been filled up to above high water mark. With the exception of a small amount of material that was put in from regrades on Third and Fourth Avenue, the area was filled under contracts between the State and Seattle-Lake Washington Waterway Company for the dredging of the East and West Waterways. Substantially all of the material was taken from the East and West Waterways and used in filling the tide lands. The area in red on plaintiff's Exhibit 5 represents the same area as the area enclosed in the circular red line on Plaintiff's Exhibit 4. The area in red at one time was subject to the ebb and flow of the tide. The outer boundaries of the area in red, which might be called the shore line boundaries, represent the original shore line of the harbor of Seattle. That which is in white, surrounding the red lines, would represent the original uplands. The distance of that area from the east, which is the top of the map, down to the East Waterway is about 6,000 feet. From the north end to the south end it is about two miles. I am speaking now of the area that is east and north of the East Waterway. That which is west of the East Waterway is designated as Harbor Island. The length of Harbor Island from north to south is about a mile and a quarter, and it is a little more than half a mile wide across from the East to the West Waterway. The irregular strip in red on the west side of the West Waterway is a little over two miles in length, and its width in the widest part, at about West Lander Street, is something like a quarter of a mile. Its narrowest part is two or
71 three hundred feet wide. On that area in red, since it has been filled, there have been numerous industries established there. Along down First Avenue South, the Seattle Hardware Com-

pany have put up a big brick building, and along on the east side of Second Avenue South I think there is probably eight or ten three to five story wholesale business houses, machinery houses and so on. Over on this side here the railroad company has put in numerous railroad buildings, roundhouses, and so on. There have been several industries established down the east line of the East Waterway, the Hammond Milling Company and the Albers Brothers and a number of them that I don't recall at the present time, but it is quite fairly well built up at the present time. It is traversed by seven or eight or nine different streets running north and south and also by streets running east and west. The area in a general way may be considered as the area where the wholesale and terminal business of the city is largely done in, and in which is the location of the principal railroad yards and depots and all of that.

Down here on the south end, or the southwest portion of Harbor Island, have been two or three industrial developments down there, the Fisher Flour Mills, the C. H. Lilly Company, the Lion Varnish Company, and boiler works, and I think it is the Pacific Pipe & Machine Works on Spokane Avenue, and several sawmills. It is quite well started towards development of the area for industrial purposes.

In addition to the Duthie Company, the Washington Shipbuilding Company—the old Puget Sound Bridge & Dredging Company—plant is on the West Waterway. The East Waterway starts in with the Skinner & Eddy; a little south of the Skinner & Eddy is the Seattle Construction & Dry Dock Company, and then there
72 are one or two launch builders, and on the west line of the East Waterway the only shipbuilding is Duthie Company. And to the south and right in here there are one or two small yards building—they are all boats, wooden vessels; then come the Fisher Flouring Mills and those, and then on the west line—or the east line of the West Waterway comes the Washington Shipbuilding Company; then on the west line of the West Waterway comes the Ames Shipbuilding Company and the Wilson Shipyards for building wooden ships. And down here where the Seattle—the Drummond Lighterage Company plant is, there are one or two small yards in there.

The Port of Seattle has constructed a number of docks and terminals along the East Waterway. In front of the Hammond Milling Company there was a small pier or wharf projected, and prior to the construction of the defendant's wharf there was a small wharf in front of the boiler works—the Fox Boiler Works. A small portion of the area to the south of what is shown on the map in red was filled by the dredging of the Duwamish Waterway, and there was a small portion just east of that shown in red that was filled in south of Spokane Avenue from the Duwamish Waterway fill, but it is not included in the red area. The land abutting upon the East Waterway on the east has been in process of being developed for the last ten or twelve years. Prior to 1913 I think there were three industries down on the east line of the East Waterway. There was the Hammond Milling Company, the Standard Oil Company—I think Albers' Mills came in later. The San Juan Fishing & Packing Com-

pany came in, I think, around 1906 or 7, possibly 1908. The San Juan Fishing & Packing Company now extend out beyond 125 feet. I think they didn't prior to 1913. As to when the projection
73 of the buildings, shown upon the map to project beyond the 125-foot line, was made I cannot say, but prior to 1913 and prior to the passage of the Act I do not recall any pier being out as far as 125 feet. They all project beyond the shore line and are out 125 feet. They had the wharf out some distance, and as to some that was the condition prior to 1913, but not as many as shown here. That was the condition, I think, as to three or possibly four industries that were there prior to 1913. That is all that were there. There were more there of the small industries that hadn't wharfed out there.

(Plaintiff's Exhibit 6 was marked "Plaintiff's Exhibit 6" for identification.)

Plaintiff's Exhibit 6 for identification is a typical cross section of the West Waterway—the East Waterway from the property line extending into the water, say 150 feet. It shows the lines, the theoretical grades or the theoretical prism of the canal that our contract provided for being taken out, the manner in which the bulkhead was constructed, and also the present shore line, if it could be so called, in the waterway. The depth of the waterway can be calculated from that. It shows that at the pier head line, 125 feet from the shore, the depth as excavated was 26 feet, and it shallows up there so that at the shore line it would be bare at times of extreme low tide—there would be no water there. It is not in a practical way navigable.

(Plaintiff's Exhibit 6 offered and admitted in evidence without objection.)

I will explain the various lines on Exhibit 6, as follows:
Starting over on the left hand side of the map, at the line marked "Property line", that represents the property line along the margin of Harbor Island. Along that property line, the outer top corner,
74 on the property line, was built a brush bulkhead. The slope of the face of that brush bulkhead was on a slope of one-to-one, that is, as it went down one foot it projected one foot into the waterway; and that was kept down to what we call the mud elevation, that is, the original surface of the mud in the tide flats. After that was built, it extended back here to—here is 12 feet on top and probably—greater at the bottom, to impound the water and material in back of it. We started in five feet from the toe of this bulkhead with a dredge and dredged out on a slope of approximately four-to-one until we reached a depth of 30 feet in the waterway at extreme low tide; and that material was put in over back of the bulkhead. The surface of the fill, the filled ground and the top of the bulkhead there was required to be at elevation 18, that is, 18 feet above extreme low tide.

Extreme low tide is 16 feet below city datum "00". The city datum is high tide. This elevation "00" is extreme low water. That

is practically the same as the United States Coast Geodetic Survey datum. The top of the bulkhead and the top of the fill was required to be at or above extreme high water, or grade 18. We generally make those bulkheads about a foot higher than what is shown here, to carry the fill from three to six-tenths higher than grade 18. There would be about one foot above extreme high tide. The tides vary, of course, between those two extremes—between zero and eighteen. These tides, the extreme high tide and extreme low tide, would not occur probably more than once or twice a year, maybe sometimes would not occur more than once in two years; but, in the main, the average high tide would run along in about ten or eleven or seven or eight feet lower than this, bringing the average high water not quite to the top of that brush bulkhead, leaving the depth down
75 six or seven feet, and that, of course, in ebbing, it would not ebb out to this line, but would probably be a foot or two above, so that the water might stand just—instead of the water line at—being as shown by the blue, it would be nearer the property line. On a 12-foot tide, the blue would run up on the slope. It would only be about a half or two-thirds up this brush bulkhead slope. Of course, the mud flat varied. It was not always just 13 feet below the grade 18. It might be plus five, as shown here, and it might be possibly zero, so that mud flat would vary from around minus 5 up to sometimes possibly plus 5 or 6. The distance between the bulkhead or property line out to the point where the blue commences, which point is the point of extreme low tide, is about 36 feet. The most land or shore that would ever be uncovered by the ebb of the tide would be a distance of 36 feet from the property line. Everything outside of that 36 feet would be covered by water at all times, and the 36-foot line would be what is generally termed the low water mark.

Assuming that the owner of the abutting property had a right to extend out to navigable waters, practically serviceable in an ordinary commercial way for serving this property with vessels, he would have to have a depth of 25 or 30 feet. If he went out 125 feet he would get 26 feet at all times. You can calculate the depth of water at any point by measuring from extreme low tide or extreme high tide out on the slope. In the condition the canal is in at the present time you could not get a depth of from 25 to 30 feet of water uniformly short of about 125 feet out from the shore line. I think that at mean low tide the chances are that you would probably have a few feet outside of the bulkhead, exposed, depending upon the elevation of the mud flats. The mean low tide is probably two or two
76 and a half feet above this, and if that was projected back it would strike in this particular case about seven and a half feet from the toe of the slope. It varies at different points along the canal. By "toe of slope" I mean the toe of the bulkhead slope. The toe of the bulkhead slope is always exposed at mean low tide. The toe of the slope extends from the property line a distance equal to the height of the bulkhead, so that the distance between the property line and the toe of the bulkhead would be about ten feet, the slope being a one-to-one. There would always be a distance of ten feet

between what would be high water mark and mean low water mark, even on a mean low tide, exposed,—the thickness of the bulkhead.

(Complainant asks to have a sketch marked for identification, and the same is marked Exhibit 7 for Identification.)

Exhibit 7 for Identification is practically the same as Exhibit 6. The red line from the point marked "bulkhead line" down to the first break, where the red line and the blue line join, represents the face of the bulkhead, one-to-one slope. And then from that point where the blue and red lines join, the red line comes on down on the theoretical boundary of the prism of the canal that we had to excavate, and goes down on a four-to-one slope, reaching the full 30 feet out and beyond—at extreme low tide reaching a full 30 feet out and beyond the 125-foot pierhead line as now established. This map shows that at the pierhead line there is an average of 27 feet of water at extreme low tide. The map shows that at extreme low tide it would strike the foot of the slope of the bulkhead. The map is platted on cross section paper. Each one of the little squares represents a foot, and each one of the larger squares ten feet.

77 From the map by counting the squares down from the low tide line you can say what the depth of the water is at any point. Where this is marked "2'" between the blue line of extreme low tide and the sloping red line would be two feet. There is another place where it is marked 11 feet, and a little further out 16 feet and 21 feet and 27 feet, so that beginning at zero it runs out to 11, 16, 21, 27 and 30 feet, as marked on this map. At extreme high tide you would add 18 feet. At high tide where the map is marked two feet there would be 20 feet at a point 25 feet from the property line. At a point 62½ feet from the shore you would have a depth of 29 feet at high tide and 11 feet at low tide. At 80 feet from the shore you would have 16 feet at low tide and 34 feet at high tide, At 100 feet from shore you would have 21 at low tide and 39 at high tide. At the pier head line you would have 27 feet at low tide and 45 feet at high tide. I am speaking of extreme high tide and extreme low tide. There is an ebb and flood tide in the East Waterway at all times, and always will be.

(Plaintiff's Exhibit 7 is received in evidence, and marked "Plaintiff's Exhibit 7.")

78 *Testimony of George F. Nicholson, Witness for Complainant.*

I am and have been for twelve years a civil engineer by profession. am now chief engineer for the Port of Seattle Commission, and ave been employed by the Port of Seattle since the organization of he engineering department about five and a half years ago, and have een chief engineer for the Port approximately two years. During he five years and a half I have had a good deal to do with the conruction and development of the Port's properties, preparing their lans and superintending the construction work, and have had ocsion to specialize more or less on dock properties, Port properties, aterways, etc.

Some time ago at the request of the Port Commission I made a series of maps and plats, showing all the development on the water front of Seattle of every kind. They were made in connection with certain plans for the improvement of the harbor that were under way by the Chamber of Commerce. I made a map showing all of the structures and industries on the East and West Waterways.

(Complainant asked to have a map marked for identification, and the same is marked "Exhibit 9 for Identification.")

Exhibit 9 for identification is a copy of the map just referred to.

(Plaintiff's Exhibit 9 for Identification is offered and received in evidence, and marked "Plaintiff's Exhibit 9.")

This map was completed about February 1st, 1918, and shows the existing structures and industries of every kind on the East and West Waterways as of that date. Looking at the map and starting
79 at West Massachusetts Street on the corner of the East Waterway—that is, the northeast corner of the East Waterway—beginning at the northeast corner of the East Waterway the first industry is the Albers Brothers' Milling Company, then the Hammond Milling Company just south of them, and across Railroad Avenue we have the Standard Oil Company, and also the Nilson & Kelez Shipbuilding Company, on the Standard Oil property, just to the south of the Standard Oil. Then we have the Stacy Street Terminal of the Port Commission, and the Chicago, Milwaukee & St. Paul Railroad Company's dock, and then we have the Pacific Construction & Engineering Company, who have a plant facing on Whatcom Avenue. The latter is a forging plant where they forge castings in connection with the shipbuilding industry. South of them is the Port Commission Hanford Street Terminal, and across the turning basin the Spokane Street Terminal of the Port Commission, and the Elliott Bay Mill Company is just south of the Port Commission property. The Albers Brothers' plant is a flouring mill. Also I see that I have overlooked the San Juan Fishing & Packing Company plant and the Commercial Boiler Works. All these plants are marked on the map. This takes up to the end of the portion of the East Waterway which is a thousand feet wide. Crossing to the west side of the East Waterway onto the east shore of Harbor Island, opposite the Port of Seattle docks at Hanford Street, and going north we have the J. F. Duthie Shipbuilding plant in litigation here, being the property leased from the O. & W. Railroad Company that is in litigation. The Duthie Shipbuilding plant ha*ve* constructed ways which extend out in the waterway area, the 125-foot strip. Those boat-like looking drawings represent four ways which extend partly out past the property line. North of the Duthie Shipbuilding plant
80 the East Waterway Dock & Warehouse Company are constructing a dock, also *also* warehouse and oil tanks to the rear of the dock, and just to the north of them Swift & Company, I believe, are constructing or have constructed oil tanks on this block, and contemplate a wharf structure on the water front. That is practically all the plants on the west side of the East Waterway. Swift

& Company are on the Oregon & Washington property too. They have some steel tanks in the rear, in about that location. East Waterway Dock & Warehouse Company, also known as Rogers Brown & Company, are constructing a wharf. It extends out to the pierhead or outer harbor line and parallels the water front. Also they are constructing a warehouse to the rear of that wharf. They are engaged in general commerce, particularly the oil business. Their plant is more especially constructed for taking care of the oil traffic, although they intend to take care of general commodities also. They are at present specializing in handling large quantities of oils from the Orient. There is now pending a lease between Rogers Brown & Company and the Port of Seattle for the use of this waterway area in front of their property, and at the meeting of the Port Commission a week ago action was taken that the permits would be issued to Rogers Brown & Company for this area and the rental put in escrow awaiting the decision of this case. An additional area has been rented to Duthie & Company by the Oregon & Washington Railroad Company, and the permit is pending with them, depending on this same litigation, and the same is true of Swift & Company. Swift & Company have constructed some steel tanks for storage of oil, and I understand that they contemplate construction of a wharf in connection with that.

81 Direct examination:

Testimony of R. C. Erskine, Witness for Complainant.

I am now and have been for sixteen years and a half engaged as a real estate broker in the City of Seattle, doing a general real estate, loan, insurance and appraisal business. I am familiar with the filled-in tide flats of the City of Seattle. I have dealt quite extensively in industrial properties, both as the owner's agent and the buyer's agent, and have acted as appraiser many times. I have been selling sites and arranging for the construction of buildings for sale and lease for factory purposes, devoting most of my time personally to that work. I represented Frank Waterhouse & Company, the purchasers of certain property across the West Waterway from Harbor Island, being Block 430, Seattle Tide Lands, at the corner of the Waterway fronting on Elliott Bay and on the Waterway, and in connection with that purchase I looked into all the conditions that I could learn about regarding all property which might possibly answer their purpose. I have studied all the maps I could find about the topographical situation in the East and West Waterways and have inspected the ground. I am more or less familiar with the situation as to the construction of the Waterways, as shown by Exhibits 6 and 7, and I have looked at similar maps before, though I didn't have the exact grades of slopes as I see them on these exhibits. Assuming that the grades of slope are correct as to the construction of that waterway, and that the abutting property owner on a waterway had no right to wharf out or to occupy for any industrial purpose any of the area between

high water line and the pier head line, shown on that map, for 125 feet deep from the property or bulkhead line, the effect on the value of any piece of upland property by a state statute which gave the upland owner a preference right to a thirty-year permit or
82 lease of the area 125 feet wide extending out into the water the whole length of his property would be to greatly enchance the value of the property. In making this statement I am taking into consideration the conditions shown by the topographical map. It is impossible to land a boat against the property line without wharfing out, and if you dug down you would undermine the property.

Assuming that under the provisions of Chapter 168 of the Laws of 1913 of this state, a preference right to a 3 year permit of the area just described is granted to an upland owner at a rental of two per cent of the assessed valuation of an equal area of upland, in accordance with the assessment for the year preceding the issuance of the permit, if we should assume that the waterway area had actually an equal value with the same area of owned land adjoining, it would seem that the rental charge would be from a fourth to a sixth of the ordinary rental, because the charge for leaseholds of ground is from four to six per cent of the value of the ground, and this charge is practicaly one per cent, because it is two per cent of the assessed valuation, which is ordinarily about half—apt to be more under than over half of the actual value of the land; so it would appear to be a nominal rental. That is assuming that the area—the water area is equal to the value of the land area, and for many purposes it is more valuable, being the controlling factor. It is a difficult thing to compare the value of the Waterway area with the value of the adjoining upland. The value would depend on the exact situation of the land in question and the uses to which it was to be put, but roughly speaking there is a very great difference in the value of the two. I regard the rental above referred to as a nominal rental.

83 At this point in the testimony of witness, the following occurred:

"Q. (by Mr. France, counsel for complainant). State whether or not it is a fact that under the custom of leasing of property, where the lease is for a long term of years, say thirty years, and the rental is based upon the leasehold value, if a rental for the whole 30 year period is ever fixed at the beginning of the period?

Mr. Bogle: I do not think that is material here.
The Court: I do not see the materiality.

Mr. France: The materiality is this, if Your Honor please: I am trying to show that this rental is merely a nominal rental, and it is based upon the theory of a license, rather than a return upon the value of the property; and I think it is a very controlling circumstance to show that if the state were dealing with this as a leasehold interest, in which it was seeking to get a return upon the

value of the property, it would provide for re-appraisals at definite periods, which is true of every lease; and, while that may be a matter that the court should take judicial knowledge of, I think it is a proper question to go to show the intention of the Legislature in fixing this merely as a license fee during the whole period of thirty years, rather than as a rental upon the value of the property.

The Court: Sustained.
Mr. France: I would like to note an exception.
The Court: Oh, yes."

Cross-examination.

One of the principal values, or of the chief elements of value of lots abutting upon this Waterway consists of its accessibility to the navigable waters, or the Waterway, and, through the waterway, to the navigable waters of Elliott Bay, and if it was shut off from that accessibility the percentage of value of the lots that would be taken away would vary with the lots in question. Taking the lots on the west side of the East Waterway I can make an approximation only, but it would be about half the value. In stating on direct examination that I considered the rental of two per cent
84 upon the accessed valuation of an equal area of the abutting property to be a nominal rental, I am taking into account the fact that the rental remained fixed for the thirty years and that it is two per cent, not on the value, but on the assessed value. That is a nominal rental. I regard the rental of $1,728.96 for three years for the use of this waterway area between the pierhead line and the shore in front of Lots 6 to 15, inclusive, of Block 393, Seattle Tide Lands, nine lots, considering the value of the property and what is given, as nominal rental. If I had sufficient use to have the upland property, I think that would be just an incident in the matter. When I was looking for property for Frank Waterhouse & Company I considered leasing one piece of property on the west side of the East Waterway, but I do not think that the Port's claim of rights in that area was discussed with me or that point raised. If so, I do not recall it. Assuming that the Act of 1913, which I have referred to, provides that if the owner of the abutting property did not make application to lease the waterway area within ninety days from the time of the passage of the Act the Port should have the power to grant or lease the waterway area to any one else it saw fit, if the property was vacant in 1913, and no use for it, and no one paying rental on it, that condition of things would have an effect on the value of the property. If the owner does not lease it he takes a chance of having somebody else lease it, in which case there would be a strip 125 feet in depth for the whole width of his lot interposed between him and deep water belonging to somebody else, and his land would become interior land so far as practical use went. I think water frontage in that position is worth twice as much as interior land back of it.

85 Redirect examination.

In my testimony last given, I am considering actual water frontage with whatever is necessary to get out on the water and use the water for navigation purposes. If there were no rights out in the water—no rights at all beyond the property line—it would always have been then interior land for practical use.

Recross-examination.

If the terms of the lease provided that this rental should cover only so much of the 30-year term as intervened between September 1st, 1913, and January 1st, 1929, and rental after December 31st, 1928, should be fixed at such sum as the Port Commission, or whatever body at that time had control of it, saw fit to fix it at, that would be a material matter in affecting the value of the property. I do not think that the fact that the right asserted by the Port includes the right to determine what kind of structures are to be constructed, what kind of material is to be used and the form of the structure, would diminish the value of the property in the hands of the owner. I think the public policy would dictate there, and, unless they had an absolutely vindictive and unreasonable Port Commission, they would permit anything that was a suitable improvement and a man could rely on that. I think that would be like building regulations in the city. The building regulations only prescribe fireproof material. It does not go beyond and dictate anything beyond that. In each building district there are certain things allowed, and you can build so many stories of one kind and so many stories of another kind, and, if there is a hall, then there must
86 not be such and such under it, and there must be so many stairways, so broad, and very many other things, but they are usually in the interest, eventually, of the man who improves the property, and I do not think adversely would affect the value of the property.

Re-redirect examination:

According to my experience, under the custom of leasing property where the lease is for a term of years, say, 30 years, and the rental is based upon the lease-hold value, the rental is sometimes fixed—determined for the whole period, but not fixed at the same rate; that is, it is stepped up. If it is not fixed by stepping up, the customary manner is to fix it by re-appraisement. It would be unusual to fix the rent for as long a period as fifteen years without a change in the rental. Ten years is as long as I have ever known it to be so fixed.

Re-recross-examination:

There are very many leases where the tenant puts up his own structures, and where they are long-term leases, but usually the rental is changed either by an original agreement or by appraisals

throughout the term. They have varying periods about that. It is a matter of agreement between different individuals. I do not happen to know of any where the period has run over ten years.

87 Redirect examination:

Referring to plaintiff's Exhibit 9, in front of Block 430 and Block 404, and blocks E, F, G, and H in block 396, of Seattle Tide Lands, all of which face on Elliott Bay, and in front of all of which there is harbor area, assuming that some fifteen years ago the rentals on those harbor areas were fixed exactly on the same basis by statute, that in front of Block 430 the rental is $37.96, in front of Block 404 the rental is $31.83, in front of Block E and part of Block F the rental is $18.60, and in front of Blocks F and G the rental is $14.50, and in front of Lot 1, Block G, $7.09, and in front of Lot 2, Block H, $7.08, and infront of Lot 1, Block H, $4.43, and that that rental fixed fifteen years ago was based on two per cent valuation of an equal area of adjoining upland, that certainly is at this date a nominal rental.

Testimony of George F. Nicholson (Recalled).

On the east side of the West Waterway, starting at the northeast corner, and running down the waterway, between West Lander Street and West Hanford we have the Washington Shipbuilding Corporation, or the Puget Sound Bridge & Dredging Company, and on the north side of West Hanford Street the Standard Boiler Works are located. They are engaged in the making of boilers. On the south side of West Hanford Street is the Lilly & Company plant, flour and feed mill, and also the Fisher Flouring Mill Company. On the west side of the West Waterway is located the Alaska-Pacific Shipbuilding Company, at the head of the Waterway, the Drummond Lighterage Company and the Ames Shipbuilding plant. The Drummond Lighterage Company are engaged
88 chiefly in the oil business; that is, the storage of oils, vegetable oil and fish oil. To the north of the Drummond Lighterage Company is located the Ames Shipbuilding Company. North of that, running out to the end, there are no improvements. Ninety-five per cent of the industries along these two waterways have taken out permits from the Port of Seattle. Every one on the East Waterway has taken out permits but the Oregon & Washington and the Alaska Steamship Company, but they have no improvements on their property.

There was a hearing before the War Department with respect to drawing back the pierhead line from 250 to 150 feet. The result of that hearing is incorporated in the Port leases to the property owners on the East Waterway. As I remember it, it was a hearing before the War Department in which all the property owners were entitled to appear, and the Port Commission was entitled to appear and took part in that hearing. The Port Commission has no record of that hearing, but we have a record of that matter incorporated in

our leases, and the substance of it is that upon the consent of the property owners and the Port Commission, the War Department changed its pierhead from 250 to 125 feet, except that as to these industries who had previously constructed their wharves beyond the 125 foot line, they were to be permitted to retain the structure in its then condition for a definite period in the future, ten years, I think. I did not attend the hearing, and I could not say, but that is the way I understand it. The only information I had was what is incorporated in our leases.

(At this point Plaintiff's Exhibit 8 is marked for identification.)

89 Plaintiff offers Exhibit No. 8 for identification in evidence, and the Court says: "It may be filed, and I will determine when I finally decide the case whether it is material."

Mr. Bogle: Mr. France and I have stipulated that this document, which has been marked Plaintiff's Exhibit "10," embodies the conditions which the Port Commission is exacting for the permit or lease of lots 10 to 16 in Block 394, to the East Waterway Dock & Warehouse Company, referred heretofore as Rogers Brown & Company, tenants of the Railroad Company. That is introduced merely to show what the practical condition that they are putting up to the landlord and his tenants is.

Now, I suppose the conditions in regard to the Swift & Company property are of like character.

Mr. France: That is the standard form of permit that the Port Commission has adopted for all waterway area permits on the East and West Waterways, and embodies a provision that the back rental from September 1st, 1913, up to the date of the execution of the permit, shall be charged. That is one of the things that is objected to, and that is the purpose largely of its introduction."

Plaintiff's Exhibit 11 is marked for identification, and witness testifies:

This is one of the plans that was requested to be furnished with the permit for waterway area, and shows the general layout and construction of the improvements in the waterway area, by J. F. Duthie & Company. The Port has a formal application that is filled out before a permit is issued.

(Plaintiff's Exhibit 12 is marked for identification).

Plaintiff's Exhibit 12 for identification is the printed form of application that all applicants for permits in the waterway area are required to sign and fill out. The defendant, J. F. Duthie & Company, in getting the permit in question here, made such an application. That has been the standard form of application since the permits have been issued, shortly after September 1st, 1913.

(It is stipulated between counsel for complainant and defendants that a full copy of the original application (Duthie applica-
90 tion shall be introduced so that the whole thing will show in the record.)

At the time the application was made, Duthie & Company submitted this plan for improvements, marked Plaintiff's Exhibit 11 for identification, and there was another detail on another map, marked "8," in connection with that.

(The printed form of application, heretofore referred to, for which a full copy of the Duthie application is to be substituted, was received in evidence and marked "Plaintiff's Exhibit 12".)
(Plat "A" and plan "B," above referred to, were received in evidence, same being attached together and marked "Plaintiff's Exhibit 11.")

The permit that was issued to J. F. Duthie & Company, that is attached to the complaint as an exhibit here, was issued approving of these plans "A" and "B" on plaintiff's Exhibit 11 and accepting the application, being plaintiff's Exhibit 12, and those are the structures which Duthie & Company subsequently built under this application. I have, as engineer of the Port of Seattle, had occasion to pass upon a number of permits for shipyards—some six or seven different shipyards—that have been constructed in the East and West Waterways, and have studied the plans of the improvements of all of these shipyards that have been constructed on the East and West Waterways in passing upon their applications. I do not think it would have been possible for J. F. Duthie & Company, or any of these other shipyards, to have constructed shipyard plants without having the right to build ways and structures out into the waterway area.

91 Cross-examination:

The Port has never adopted any standard forms of construction which it would require on the East Waterway. They only approve the plans which are submitted with the application. The structure has to be sufficient to sustain certain loads. The plans are approved by the Port Commission in conjunction with the City Building Department. The Port has never adopted any standard rules as to the material to be used in these structures, or the carrying capacity, or in any other respect. That would be rather impossible, because there may be some improvements put up for light commodities, and other structures for heavy commodities, and it would be rather hard to adopt a uniform rule. The Port requires a party who wants to improve in front of his abutting property to submit to the Port the plans of the improvement proposed, and the Port either accepts or rejects them. These Duthie plans were approved, and constructed in accordance with the plans.

Albers Milling Company owns the first structure on the east side of the East Waterway, next to Massachusetts Street. I do not

remember when that was put there. I am sure it was prior to 1913. The structure extended out to pierhead line. The structure next to it is owned by Hammond Milling Company, and was built prior to 1913, and extended out to the 125-foot pierhead line. The San Juan Fishing & Packing Company has a plant there that was constructed prior to 1913, and it extended out beyond the 125-foot line. The Commercial Boiler Works has a structure there that extends out to the pierhead line and was built prior to 1913. Some of the structures shown on this plat extend beyond the 125-foot line. They all extend beyond what is called the property
92 line. It is a wharfing out with all of them. All of them that were in existence prior to 1913 had wharfed out for such distance as they saw fit. Some of those improvements run back considerably before 1913. I could not say just what years. The majority of the improvements that were put on the lots adjoining the East Waterway prior to 1913 wharfed out for a greater or less distance beyond the property line and into the area between that line and the pierhead line.

(By stipulation, complainant at this point offers in evidence and reads into the evidence two deeds, being original deeds from the State of the tide-lands involved in this cause to defendant Oregon & Washington Railroad Company's predecessors in title, as follows:

Deed.

"Auditor's Number 303369.

STATE OF WASHINGTON

to

GEORGE S. McLAREN.

Consideration $1,503.
Dated July 7, 1904.
Filed for record July 12, 1904, and recorded in Volume — of Deeds, page —.

First party does hereby grant, bargain, sell and convey unto the second party, and to his heirs and assigns, the following described tide lands of the first class, situate in front of the City of Seattle, King County Washington, to-wit:

Lots one to nine, inclusive, block 393, as shown on the official map of Seattle Tide Lands, filed with the Board of State Land Commissioners at Olympia, Washington, March 15, 1895.

Subject, however, to any lien or liens that may arise or be created in consequence of an act of the Legislature of the State of Washington, entitled 'An Act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state,

granting rights of way across lands belonging to the state,' approved March 9, 1893.

Witness the seal of state affixed.

HENRY McBRIDE,
Governor.

Attest:

SAM H. NICHOLS,
Secretary of State.

State Record of Tide Land Deeds. Volume 5, page 210."

83

Deed.

"File No. 370,709.

STATE OF WASHINGTON

to

V. HUGO SMITH.

Dated December 26, 1905.
Consideration $976.00.
Recorded Jan. 9, 1906, Vol —, Deeds, page —.

First party does hereby grant, bargain, sell and convey unto second party, his heirs and assigns, the following described tide land of the first class, situate in front of the City of Seattle, in King County, Washington, to-wit:

Lots 10, 11, 12, 13, 14 and 15, Block 393, as shown on the official map of Seattle Tide Lands filed with the Board of State Land Commissioners at Olympia, Washington, on March 15, 1895.

Subject, however, to any lien or liens that may arise or be created in consequence of or pursuant to the provisions of an act of the Legislature of the State of Washington, entitled 'An Act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights of way across lands belonging to the state.' Approved March 9, 1893.

To have and to hold the said premises, with their appurtenances, unto second party, his heirs and assigns, forever.

Witness the seal of the state.

[STATE SEAL.]

ALBERT E. MEAD,
Governor.

Attest:

BEN S. FISH,
Asst. Secretary of State.

State Record of Tide Land Deeds, Vol. 7, page 228."

84 It is stipulated and agreed by and between counsel for the Port of Seattle and the Oregon & Washington Railroad Com-

pany, for the purposes of this action, that the title of the Oregon & Washington Railroad Company to the tide lands involved herein is deraigned as follows:

Decree of the Superior Court of the State of Washington for King County in cause No. 23172, dated January 23, 1899, awarding to George Kinnear, William R. Braley and D. C. Brawley the preference right to purchase lots 1 to 9, inclusive, Block 393, Seattle Tide Lands, according to the plat thereof as surveyed and platted by the Board of Appraisers of Tide and Shore lands for King County, recorded in the office of the auditor of said county on February 11, 1895; which decree likewise confirmed in The Indemnity Trust Co., the preference right to purchase lots 10 to 15 and part of lot 16, Block 393, Seattle Tide Lands according to said plat, the Elliott Bay Tide Land Company the preference right to purchase parts of lots 17, 18, 19 and 20, Block 393, Seattle Tide Lands according to said plat, and in the Allen & Nelson Land Co. the preference right to purchase the balance of said lots 17, 18, 19 and 20, Block 393, Seattle Tide Lands, and a part of lot 16, Block 393, Seattle Tide Lands, according to said plat.

Tide land deed of the State of Washington, dated July 7, 1904, and recorded in the office of the auditor of King County, July 12, 1904, granting and conveying to George S. McLaren lots 1 to 9 inclusive, Block 393, Seattle Tide Lands, to whom the interest of George Kinnear, William R. Brawley and D. C. Brawley has passed by mesne conveyances; also Tide-Land deed of the State of Washington, dated December 20, 1905, and recorded in said office on January 9, 1906, granting and conveying to V. Hugo Smith lots 10 to 15 inclusive, Block 393, Seattle Tide Lands, also Tide-Land deed
95 of the State of Washington, dated August 4, 1902, and recorded in said office August 8, 1902, granting and conveying to Hortense Amalie Smith part of lot 16, Block 393, Seattle Tide Lands; also Tide-Land deed of the State of Washington, dated June 20, 1900, and recorded in said office June 27, 1900, granting and conveying to the Allen & Nelson Land Co. the Balance of lot 16, Block 393, Seattle Tide Lands, and parts of lots 17 to 20, inclusive, Block 393, Seattle Tide Lands upon completion of its contract for the purchase of the same; and also Tide-Land deed of the State of Washington, dated August 9, 1902, and recorded in said office September 11, 1902, granting and conveying to the Elliott Bay Tide Land Co. the balance of lots 17 to 20 inclusive Block 393, Seattle Tide Lands upon completion of its contract for the purchase of the same.

Deed of the aforesaid George S. McLaren and his wife, dated July 13, 1904, and recorded November 28, 1905, conveying lots 1 to 9 inclusive, Block 393, Seattle Tide Lands, to the Northwestern Securities Company; and deed by said company, dated November 27, 1905, and recorded November 28, 1905, conveying said lots to V. Hugo Smith and Clarence S. Preston; and deed by them dated January 25, 1906, and recorded February 7, 1906, conveying said lots to Joseph Hellen.

Deed of the aforesaid V. Hugo Smith, dated January 23, 1906, and recorded February 8, 1906, conveying lots 10 to 15, inclusive, Block 393, Seattle Tide Lands, to Joseph Hellen.

Deeds of the aforesaid Allen & Nelson Land Co. and Elliott Bay Tide Land Company, dated September 8, 1902, and recorded September 11, 1902, conveying to J. D. Houghton the whole of lots 17 to 20 inclusive, and part of lots 16, Block 393, Seattle Tide Lands; and deed, dated January 30, 1906, and recorded February 6,
95 1906, conveying said lots and said part of lot 16, to Joseph Hellen.

Deed of the aforesaid Joseph Hellen and his wife, dated March 1, 1906, and recorded March 23, 1906, conveying lots 1 to 20, inclusive, Block 393, Seattle Tide Lands, to the Washington Northern R. Co.; and deed of Hortense Amalie Smith, dated April 25, 1906, and recorded April 27, 1906, conveying part of lot 16, Block 393, Seattle Tide Lands to Henry Broderick; and deed of Henry Broderick, dated and recorded on the same days respectively, conveying said part of lot 16 to the Washington Northern R. Co.

Deed of the Washington Northern R. Co., dated May 25, 1906, and recorded June 5, 1906, confirmed by deed dated July 24, 1906, and recorded July 24, 1906, conveying the aforesaid lots 1 to 20 inclusive, Block 393, Seattle Tide Lands to the Oregon & Washington Railroad Company.

97 It is stipulated between counsel for complainant and defendant Oregon & Washington Railroad Company that the conveyances made to Joseph Hellen were for the defendant Railroad Company, for whom the purchase was made by Hellen and that the amounts paid by said defendant through Hellen for the various lots, including the lots involved in this cause, Lots 6 to 15 in Block 393, Seattle Tidelands, was as follows:

Lots 1 to 9, $136,350.
Lots 10 to 15, $90,900.
Part of lot 16, $15,360.
Part of lot 16, all of 17 to 20 inclusive, $45,450.
Making a total purchase price of $288,060.

It is further stipulated that in addition to said purchase prices the defendant Railroad Company has paid assessments for filling the lots as follows:

Lots 1 to 3, $16,976.56.
Lots 4 to 6, $16,731.29.
Lots 7 to 15, $48,934.27.
Lots 16 to 20, $15,736.99.

The total of these assessment liens for filling the lots amounting to $98,379.11. So that the property has cost the defendant company, in the purchase price and filling expenses, $386,439.11.

98 Plaintiffs' Exhibit 2 consists of a contract and supplement thereto, both dated October 27th, 1894, between the State of Washington and Eugene Semple for the excavation of Lake Washington Canal and East Waterways and the filling of Seattle Tidelands under the terms of Chapter 99 of the Laws of Washington of 1893, and an assignment of said contract to Seattle and Lake Washington Waterway Company of the same date; also a contract and supplement thereto between the same parties under the same Act for

the excavation of West Waterway and filling of tidelands, also assigned to said Seattle and Lake Washington Waterway Company.

99 Plaintiffs' Exhibit 8 is as follows:

Resolution No. 142.

A Resolution of the Port Commission of the Port of Seattle Establishing the Fairway in the East Waterway.

Be it resolved by the Port Commission of the Port of Seattle as follows:

Section 1. The pier head lines indicated on the official map of the harbor of Seattle in the East Waterway at a distance from the shore line of 250 feet were so indicated at a time when the future needs of navigation and commerce of the Port of Seattle were necessarily problematical and uncertain; and the intervening lapse of time has produced a better knowledge of the subject, this being especially true since the organization of the Port District of the Port of Seattle and its recent adoption of a comprehensive scheme for the improvement of the port, and its initiation of a policy of public ownership and operation of harbor facilities, and recent development in ship construction and the opening of the Panama Canal within the next few months will soon bring into the East Waterway a size of vessel and a volume of shipping, such volume to materially increase with the opening of the Duwamish Waterway, which were entirely unforeseen when said pier head lines were so indicated.

Therefor- the Port Commission now and hereby finds the fact to be that an open fairway of 750 feet in width in the East Waterway is essential in the interest of navigation.

Section 2. The Port of Seattle is now developing at the south end and on both sides of said waterway an ocean terminal at a cost
100 exceeding four million dollars, which is so planned and is so to be constructed that the largest ships and cargoes which may come into or go out of the harbor of Seattle may be accommodated thereat, and by modern methods to be adopted for their accommodation and cheapness of the port to shipping, to be consummated by their public operation, the shipping of the port and the commerce of the state will be advantaged and increased thereby; and to the successful operation of said terminal a fairway in and throughout the length of the East Waterway, not less than 750 feet in width, is essential, and the Port Commission now and hereby so finds the fact to be;

Now, therefore, be it resolved by the Port Commission of the Port of Seattle, as follows:

Section 1. Insomuch as the Legislature, by Chapter 168 of the session laws of 1913, empowered the Port of Seattle to make use of any portion of the waterway area in the East Waterway situate between the shore on either side and the pier head line without having to acquire the right so to do from any shore owner by condemnation or otherwise, the Port Commission of the Port of Seattle does hereby

find and declare that the outer one-half of the waterway area between the shore and the pier head line on either side of said waterway is needed to be used by the Port of Seattle for the purpose of navigation, for the reasons aforesaid, and for other sufficient reasons in the public interest, and the same is hereby appropriated by the Port of Seattle, not only for the purposes of navigation generally, but as a necessary means of access to and egress from its ocean terminals aforesaid, and the same is hereby dedicated to those purposes and accordingly reserved from permit or license under the provisions of said Chapter 168.

101 Adopted by the Port Commission of the Port of Seattle in open session this 10th day of September, 1913, and signed by its proper officers in open session authentication of its passage, on the same date.

H. M. CHITTENDEN,
President of the Port Commission of the Port of Seattle.

Attest:

C. E. REMSBERG,
Secretary of the Port Commission of the Port of Seattle.

Case No. 118 E. Plaintiffs' Exhibit 8. United States District Court, Western Dist. of Washington. Port of Seattle vs. O. W. R. R. Co. et al. Filed Mar. 14, 1918. Frank L. Crosby, Clerk, by S. E. Leitch, Deputy. (Permitted to be filed. Ruling reserved as to competency.)

102 Plaintiffs' Exhibit 10 is as follows:

This indenture: Made this — day of February, 1918, by and between the Port Commission of the Port of Seattle, and the East Waterway Dock & Warehouse Co., a corporation, hereinafter termed the Permittee;

Witnesseth: That, whereas, the Permittee has leased from the Oregon-Washington Railway Company, lots 10 to 16, inclusive, block 394 of Seattle Tide Lands, according to the official plat thereof, and

Whereas, on the — day of January, 1918, said Permittee filed with the Port Commission an application under an Act of the Legislature approved March 22, 1913, entitled "An Act permitting and regulating the use of the waterway areas between the boundaries thereof and Government Pierhead Lines, and providing for the disposition of receipts therefrom, for a permit covering the portion of the West Waterway in the harbor of Seattle, hereinafter described.

Now, therefore, the Port Commission does hereby grant unto the Permittee a permit to use the following described property situated in the Port District of Seattle, and being a part of the East Waterway situated in front of the lands above described, the portion

of the Waterway, the use of which is so granted, being more particularly described as follows, to wit:

Beginning at the intersection of the north line of West Hanford street and the west margin of the East Waterway; thence north 45° east, a distance of 176.77 feet to the pierhead line; thence north along pierhead line 604.44 feet; thence south 45° west 176.77 feet to the west margin of East Waterway; thence south along the west margin of East Waterway 604.44 feet; containing 75,555 square feet.

For the term of twenty-five years (25) from the first day of September 1913, said date being taken as the date of commencement of this Permit. This Permit is granted in consideration of
103 the covenants, conditions and stipulations herein contained, and of the payment of the sum of Eight hundred sixty-five and 60/100 ($865.60) Dollars, being the rental on said waterway area from September 1, 1913 to September 1, 1918, the receipt of which sum is hereby acknowledged and in consideration of the payment annually, beginning the first day of September, 1918, of the sum of two hundred sixteen and 40/100 ($216.40) Dollars, payable annually in advance, said sum being equal to two per cent of the assessed valuation of 1912, of an equal area of adjoining and abutting lands (exclusive of improvements thereon). Each subsequent payment is to be made on or before the first of September, 1918.

The rental above prescribed shall cover only so much of the twenty-five year term as will intervene between —— and ——, the rental after December 31st 1928, to be controlled and fixed in the manner and by the public authority or authorities then provided by law for the same; but in case *on* provision shall then have been made for the manner of fixing or the public authority to fix the same, then such rental shall be fixed by the Port Commission.

The permittee covenants to give and keep in force during the term of this lease the bond required by said Act of the Legislature in the penal sum of Five hundred Dollars ($500).

The Permittee covenants not to make or suffer to be made any artificial filling in any of said area or any deposit of rock, earth, ballast, refuse, garbage, or other material, within such area, except such as may have been previously approved in writing by the Port Commission.

It is a condition of this Permit that the area herein described or such reasonable portion thereof as shall be designated by the Port Commission, having in view the requirements of the business
104 proposed to be carried on thereon, shall be improved upon plans approved by the Port Commission, the construction of such improvement to be commenced on or before the — day of —— and to be completed on or before the — day of —— unless either of such times shall be hereafter extended by resolution of the Port Commission, and the Port Commission hereby approved the plans for said improvement and the sufficiency of the area to be improved which are described in the Exhibits "A" and "B" and "C" accompanying the permittee's application for this permit filed in the office of the Port Commission — and numbered —, so far as the

same are embraced within the area above described, but the other character of said improvements may be changed either before or after completion by the consent in writing of the Port Commission.

It is mutually covenanted as follows:

(1) Nothing herein contained shall confer upon, create or recognize in the Permittee any right or privilege in or to any strip of waterway abutting any street end between prolongations of the lines of such street, but the control of and the right to use such strip is hereby reserved to and recognized to be in the Port of Seattle.

(2) The Port Commission shall have power, upon sixty (60) days' notice, to cancel this permit for a substantial breach by the permittee of any of the conditions thereof, or for lack of a bond as herein required.

(3) The Permittee hereby waives any claim for damage which may occur to its improvements by reason of the dredging to a depth of minus fifty-two (52) feet City datum with the necessary slopes of the fairway established by Resolution No. 143 of the Port
105 Commission.

(4) The permittee hereby waives any and all claim for a permit for any part of the East Waterway in front of his or its said tide lands outside of the area *fo* said waterway hereinbefore described.

(5) Whereas, a certain litigation is pending between the Port of Seattle and the Oregon-Washington Railway and Navigation Co., in which there is involved the right of the Port of Seattle to collect rent on said waterway area in said waterway; it is agreed that in the event a final judgment is entered by the Court of Last Resort, to which said litigation is subject, that the Port of Seattle is not entitled to collect such rent, then the Port of Seattle agrees to reimburse second party for the rental paid hereunder.

Executed in duplicate the day herein first named.

THE PORT COMMISSION OF THE PORT OF SEATTLE,

By —— ——,
Its President.

Attest:

—— ——,
Its Secretary.

EAST WATERWAY DOCK AND WAREHOUSE CO.,

By —— ——,
Its President.

Attest:

—— ——,
Its Secretary.

106 *Bond.*

The undersigned: East Waterway Dock & Warehouse Company, a corporation, as Principal, and —— —— and —— —— as sureties, do confess ourselves indebted to the Port of Seattle in the penal

sum of Five hundred Dollars, and for the payment of which, we so by these presents bind ourselves, and our and each of our, heirs executors, administrators or successors, jointly and severally, firmly by these presents.

Sealed with our seals this — day of February, 1918.

The condition of the above obligation is such that,

Whereas, the Principal did enter into the foregoing contract with the Port Commission of the Port of Seattle (which contract is hereby made a part of this bond), whereby the Principal accepted a permit from the said Port Commission for the use of the area of waterway described in said permit, conditioned for the payment of certain rentals specified therein;

Now, therefore, if the said permittee, the principal herein, shall well and truly pay said rentals, then this bond shall be considered satisfied and discharged; otherwise it shall have full force and effect.

Signed and sealed the day and year in this bond first above written.

EAST WATERWAY DOCK & WAREHOUSE CO.,

By —— ——,
Its President.

Attest:

—— ——,
Its Secretary.

—— ——,

—— ——,
Sureties.

107 STATE OF WASHINGTON,
County of King, ss:

—— —— and —— —— being first duly sworn, each for himself, and not one for the other, deposes and says: That he is one of the sureties to the foregoing bond; that he is a citizen of the State of Washington and is not barred by any statute of said state from executing bonds or becoming surety; that his execution of the foregoing bond is his free and voluntary act and deed for the uses and purposes therein mentioned; that he is worth the sum of $500 over and above all his just debts and liabilities, in property situate in the State of Washington and not exempt from sale on execution.

—— ——.
—— ——.

Subscribed and sworn to before me, this — day of February, 1918.

—— ——
Notary Public in and for the State of Washington, Residing at Seattle.

The foregoing bond and surety thereon approved this — day of February, 1918.

President of the Port Commission of the Port of Seattle.

Case No. 118E. Plaintiff's Exhibit 10. United States District Court, Western Dist. of Washington. Port of Seattle vs. O. W. R. R. Co. et al. Filed Mar. 14, 1918. Frank L. Crossby, Clerk. By S. E. Leitch, Deputy. (Admitted)

108 Plaintiffs' Exhibit 12 is as follows:

No. 41.

Application for Waterway Permit.

To the Port Commission of the Port of Seattle:

The undersigned J. F. Duthie & Company, a Corporation entitled to acquire and hold lands under the laws of the state of Washington, residing at Seattle, Washington, hereby applies for a permit for the use of the following described portion of the waterway situate in the Port of Seattle, to wit: an area 125 feet in depth, in front of lots 6-15 incl., block 393, of Seattle Tide Lands, according to the official plat thereof, the shore frontage being particularly described as follows:

Beginning at the intersection of the southerly margin of West Hanford Street and the west margin of the East Waterway; thence south four hundred seventy and twenty-eight hundredths (470.28) feet to the true point of beginning; thence south along the west margin of the East Waterway seven hundred sixty-three (763) feet; thence east one hundred twenty-five (125) feet to pierhead line; thence north along pierhead line eight hundred eighty-eight (888) feet; thence south forty-five (45) degrees west one hundred seventy-six and seven hundred seventy-seven thousandths (176.777) feet to point of beginning, containing 103,250 square feet; the same being shown on the plat, marked "Exhibit A," attached to and made a part hereof.

Said permit is desired for the term of 3 years, for the purpose of improving the following portion thereof: All as described above in the following manner, to-wit:

109 To build wharf, drive dolphins and mooring piles, launching ways, etc., for ship yard, the said improvement being described in the accompanying exhibits "B" and "C."

The applicant desires to commence the construction of the improvement within 30 days after the granting of the permit.

The applicant estimates the rental to be $288.16 per year.

This application is made in accordance with the terms and provisions of Chapter 168, Session Laws of 1913, and is submitted subject to the approval of said Port Commission as to extent of area to be

improved, character of improvement, and time of commencement and completion of construction of improvement.

Dated at Seattle, Wash., this 4th day of October, A. D. 1916.

J. F. DUTHIE & CO.,

(Signed) By C. D. BOWLES, *Pres.*

Applicant.

P. O. Address—.

NOTE.—See instructions on reverse side.

(Instructions on Reverse Side.)

Rules Governing the Submission of Applications for Waterway Permits.

1. Accompanying each application and made a part thereof shall be: (*a*) a map marked "Exhibit A," showing the location of the portion of the waterway, use of which is desired; (*b*) a plat marked "Exhibit B," showing detail plans of improvements to be made or already existing on the applied for area; (*c*) specifications marked "Exhibit C," to accompany the detail plans in "Exhibit B."

110 2. "Exhibit A" must be on good quality mounted paper, 18x24 inches, and must show the location of the area desired with the frontage of the adjoining lots or blocks of the tide lands; also the ground plan of docks or wharves to be constructed or existing; also showing buildings located on or proposed for such wharves. All courses and distances must be clearly marked. The projection of all upland streets (unless such streets have been vacated by the city) must be excluded. Where the pier head line is a tangent, the area applied for must be bounded by the projection of the abutting lot or block lines. Where angles occur in such abutting lot or block lines, the area in front of such angle will be divided by bisecting such angle. Where angles occur in the pier head line, the area in front of such angles will be divided by the bisection of the angle.

3. "Exhibit B" shall be on a good quality of mounted paper, 18x24 inches, and shall show a detail plan of the improvements to be made or already existing, showing distances from center to center of piles, depth of water, height above water, and details of superstructures; also showing methods of bracing, where any is used; also a plan of slips; but no buildings need be shown on the detail plans.

4. "Exhibit C" must accompany the application, and must give length and dimensions of piling and depth driven, dimensions of caps, dimensions and spacing of stringers, thickness of planking, length and dimensions of drift bolts, size and number of spikes, and details of construction.

5. "Exhibit B. and C," here called for, are intended to cover all details of the construction of docks, wharves and other struc-

111 tures; and such plans and specifications must be such as would be used in actual construction, and no detail, whether

here called for or not, must be omitted that would be necessary to such construction.

6. If the applicant is a corporation, the application must contain a statement showing what percentage, if any, of its capital stock is held by aliens.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 8, 1918. Frank L. Crosby, Clerk. By Edw. Lakin, Deputy.

112 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant and Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. Duthie & Company, a Corporation, Defendants and Appellees.

Order Approving Statement of Evidence and Directing Annexation of Exhibits.

The foregoing statement of evidence having been heretofore lodged in the clerk's office and due notice having been given to the attorneys of all parties of such lodgment, and more than ten days having elapsed after such notice, and this being the time and place named in said notice for the approval of said statement, and no objection having been made or amendments proposed by any party, it is by the court

Found that said statement is true, properly prepared and complete, with the exception of the exhibits hereinafter mentioned, and the said statement is now approved and made a part of the record herein for the purpose of appeal.

It is further ordered that the clerk of this court be and he is hereby directed to annex to the said statement Exhibits Nos. 1, 3, 4, 5, 6, 7, 9 and 11, on file in this court, and the said exhibits are hereby made a part of the said statement of evidence and a part of the record herein for the purposes of appeal.

Done in open court this fifteenth day of April, 1919.

EDWARD E. CUSHMAN,
Judge.

Indorsed: Statement of Evidence. Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 15, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

113 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, et al., Defendants.

Petition for Appeal.

To the Honorable Jeremiah Neterer, District Judge:

The above named Port of Seattle, complainant in the above entitled cause, feeling aggrieved by the decree rendered and entered in the said cause on the 14th day of February, A. D. 1919, does hereby appeal from the said decree to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, under the rules of said court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

HAROLD PRESTON AND
PRESTON, THORGRIMSON & TURNER,
Attorneys for Complainant and Appellant.

Appeal allowed this 15th day of April, 1919, upon giving bond as required by law for the sum of Five hundred Dollars ($500.00).

EDWARD E. CUSHMAN,
Judge.

114 Indorsed: Petition for Appeal. Filed in the United States District Court, Western District of Washington, Northern Division, April 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

115 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant and Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, et al., Defendants and Appellees.

Assignment of Errors.

Now comes the complainant and appellant in the above entitled cause and files the following assignment of errors upon which complainant and appellant will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the Fourteenth day of February, 1919.

I.

That the District Court of the United States for the Western District of Washington, Northern Division, erred in denying complainant's motion to remand the above entitled cause to the Superior Court of the State of Washington in and for King County.

II.

That said District Court erred in failing and refusing to enter a decree for complainant as prayed for in complainant's complaint in the above entitled cause.

III.

That said District Court erred in entering a decree in said cause finding and decreeing that complainant has no proprietary rights or interests in the water area between the shore line and the pierhead line in front of the lots owned by the defendant Oregon & Washington Railroad Company, described in the pleadings in said cause.

116 IV.

That said District Court erred in finding and decreeing that complainant is not entitled to lease the waterway area between the shore line and the pier head line in front of the lots owned by the defendant Oregon & Washington Railroad Company, described in the pleadings herein.

V.

That said District Court erred in finding and decreeing that complainant is not entitled to deprive the defendant Oregon & Washington Railroad Company of access to the navigable waters of said waterway over said waterway area.

VI.

That said District Court erred in finding and decreeing that the provisions of Chapter 169 of the Laws of Washington of 1913, providing for leasing of said waterway area and collection of revenue therefor, are invalid, because the same are in conflict with Section 10, Article I of the Constitution of the United States and with the Fourteenth Amendment to said Constitution.

VII.

That said District Court erred in finding and decreeing that the defendant Oregon & Washington Railroad Company as the owner of the abutting lots is entitled to access to and from said lots to and from the deep or navigable waters of said waterway across said waterway area subject to proper Governmental supervision.

VIII.

That said District Court erred in finding and adjudging in the said decree that the State of Washington has never established any harbor lines in said waterway.

117

IX.

That said District Court erred in finding and adjudging in the said decree that complainant is not entitled to any equitable relief in the above entitled cause.

X.

That said District Court erred in decreeing that the bill of complaint in the above entitled cause be dismissed.

Wherefore the complainant and appellant prays that said decree be reversed, and that said District Court for the Western District of Washington, Northern Division, be ordered to enter a decree reversing the said decree of the above entitled District Court and awarding complainant and appellant the relief prayed for in the bill of complaint herein.

HAROLD PRESTON AND
PRESTON, THORGRIMSON &
TURNER,
Attorneys for Complainant and Appellant.

Indorsed: Assignment of Errors. Filed in the United States District Court, Western District of Washington, Northern Division, April 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

118 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant and Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. Duthie & Company, a Corporation, Defendants and Appellees.

Bond on Appeal.

Know all men by these presents, That we, Port of Seattle, a municipal corporation, as principal, and Fidelity and Deposit Company of Maryland, a surety company duly authorized to do business under the laws of the State of Washington, as surety, are held and firmly bound unto Oregon & Washington Railroad Company, a corporation, and J. F. Duthie & Company, a corporation, defendants above named, in the sum of Five Hundred Dollars ($500.00), lawful money of the United States, to be paid to them and their respective successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors, by these presents.

Sealed with our seals and dated this 15th day of April, 1919.

Whereas, the above named Port of Seattle, a municipal corporation, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree of the United States District Court for the Western District of Washington, Northern Division, in the above entitled cause,

Now, therefore, the condition of this obligation is such that
119 if the above named Port of Seattle shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

PORT OF SEATTLE, A MUNICIPAL CORPORATION,
By ROBERT BRIDGES,
President of the Port Commission of the Port of Seattle, and
T. S. LIPPY,
Secretary of the Port Commission of the Port of Seattle.
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
L. J. WYCKOFF,
Attorney-in-Fact,
A. W. WHALLEY,
Agent.

[Corporate Seal of F. & D. Co.]

The within bond is approved both as to sufficiency and form this 15th day of April, 1919.

EDWARD E. CUSHMAN,
Judge of the District Court of the United States for the Western District of Washington, Northern Division.

Indorsed: Bond on Appeal. Filed in the United States District Court, Western District of Washington, Northern Division, April 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

120 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant and Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. Duthie & Company, a Corporation, Defendants and Appellees.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of record for appeal in the above entitled cause, and will include in the said transcript the following:

1. The record on removal from the Superior Court of the State of Washington in and for King County to the above entitled court, consisting of the following papers.

(a) Complaint.

(b) Affidavit of Service.

(c) Summons.

(d) Petition of Oregon & Washington Railroad Company for removal.

(e) Order granting petition for removal.

(f) Notice of presenting petition and bond for removal.

(g) Bond on removal.

(h) Certificate of Superior Court Clerk as to transcript.

2. Motion to Strike, filed February 5th, 1917.

3. Motion to Remand, filed April 20th, 1917.

4. Memorandum Decision, filed May 7th, 1917.

5. Order Denying Motion to Remand, filed May 9th, 1917.

6. Order Granting Motion to Strike, filed May 22nd, 1917.

7. Answer of Defendant Oregon & Washington Railroad Company, filed June 18th, 1917.

8. Election to stand on Complaint, filed June 20th, 1917.

9. Answer of Defendant J. F. Duthie & Company, filed October 20th, 1917.

121 10. Memorandum Decision, filed September 9th, 1918.

11. Decree, filed February 14th, 1919.

12. Order Entering Exceptions, filed February 14th, 1919.

13. Statement of Evidence with attached exhibits, and order approving same.

14. Petition for appeal and allowance thereof.

15. Assignment of Errors.

16. Bond on Appeal and approval thereof.

17. Stipulation filed April 15, 1919.

To which transcript should be annexed the original citation on appeal.

Respectfully submitted,

HAROLD PRESTON,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Complainant and Appellant.

Acknowledgment of Service.

We hereby acknowledge service of the foregoing Praecipe this 15th day of April, 1919.

____ ____,
Attorneys for Defendant and Appellee Oregon & Washington Railroad Company.

____ ____,
Attorneys for Defendant and Appellee J. F. Duthie & Company.

Service of the within Praecipe by delivery of a copy to the undersigned is hereby acknowledged this 15th day of April, 1919.

BOGLE, MERRITT & BOGLE,
Attorneys for Def't & Appellee Oregon & Washington Railroad Company.

AUST & TERHUNE,
Attorneys for Def't and Appellee J. F. Duthie & Co.

Indorsed: Præcipe for Transcript of Record. Filed in the United States District Court, Western District of Washington, Northern Division, April 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

122 United States District Court, Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. Duthie & Company, a Corporation, Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 121, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by præcipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the Supreme Court of the United States.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred, and paid in my office by or on behalf of the Appellant for making record, certificate or return to the Supreme Court of the United States, in the above entitled cause, to wit:

123 Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return, 327 folios at 15c..... $49.05
Certificate of clerk to transcript of record—4 folios at 15c. .60
Seal to said certificate..... .20
Certificate of clerk to copies of original exhibits—3 folios at 15c ..... .45
Seal to said certificate..... .20

I hereby certify that the above cost for preparing and certifying record amounting to $50.50 has been paid to me by counselors for appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 2d day of May, 1919.

[Seal United States District Court, Western District of Washington.]

F. M. HARSHBERGER,
Clerk United States District Court.

124 In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 118.

PORT OF SEATTLE, a Municipal Corporation, Complainants and Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY, a Corporation, and J. F. Duthie & Company, a Corporation, Defendants and Appellees.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Oregon & Washington Railroad Company, a corporation, and J. F. Duthrie & Company, a corporation, Greeting:

You are cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, in the District of Columbia, in not exceeding sixty days from the date of signing this citation, pursuant to an order allowing an appeal, filed and entered in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, from the final decree signed, filed and entered on the fourteenth day of February, 1919, in that certain suit, being In Equity No. 118, wherein Port of Seattle, a municipal corporation, is complainant, and you are defendants and appellees, to show cause, if any there be, why the decree against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness, the Honorable Edward E. Cushman, United States
125 District Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 5th day of April, A. D. 1919, and of the Independence of the United States, 143.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington, Northern Division.

126 & 127 Service of the within citation by delivery of a copy to the undersigned is hereby acknowledged this 15th day of April, 1919.

BOGLE, MERRITT & BOGLE,
Attorneys for Def't and Appellee,
Oregon & Washington Railroad Company.
AUST & TERHUNE,
Attorneys for Def't and Appellee,
J. F. Duthie & Co.

Office of the Clerk Supreme Court U. S. Received May 9, 1919.

[Endorsed:] In Equity. No. 118. In the District Court of the United States for the Western District of Washington, Northern Division. Port of Seattle, a municipal corporation, Complainant, vs. Oregon & Washington Railroad Company, et al., Defendants. Citation. Filed in the United States District Court Western District of Washington, Northern Division, Apr. 15, 1919. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy. Service of papers in this case may be made upon Preston, Thorgrimson & Turner, Attorneys for Complainant, at Room 911 Lowman Block, Seattle, Washington.

Endorsed on cover: File No. 27,128. W. Washington D. C. U. S. Term No. 1042. Port of Seattle, appellant, vs. Oregon & Washington Railroad Company and J. F. Duthie & Company. Filed May 22d, 1919. File No. 27,128.

Vol. II

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19[illegible]

No. 207. 107

PORT OF SEATTLE, APPELLANT,

vs.

OREGON & WASHINGTON RAILROAD COMPANY AND J. F. DUTHIE & COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

FILED MAY 22, 1913.

(27,128)

FOLD-OUTS ARE TOO LARGE TO BE FILMED

APR 3 19

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 107

PORT OF SEATTLE, *Appellant*,

vs.

OREGON & WASHINGTON RAILROAD COMPANY and J. P. DUTHIE & COMPANY, *Respondents*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Appellant

HAROLD PRESTON,
O. B. THORGRIMSON,
LEANDER T. TURNER,
Attorneys for Appellant.

PRESTON, THORGRIMSON & TURNER,
Of Counsel.
911 Lowman Building, Seattle, Washington.

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 377.

PORT OF SEATTLE, *Appellant,*

vs.

OREGON & WASHINGTON RAILROAD COMPANY and J. F. DUTHIE & COMPANY, *Respondents.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON. NORTHERN DIVISION.

Brief of Appellant

HAROLD PRESTON,
O. B. THORGRIMSON,
LEANDER T. TURNER,
Attorneys for Appellant.

PRESTON, THORGRIMSON & TURNER,
Of Counsel.
911 Lowman Building, Seattle, Washington.

INDEX

	Page
ACT OF 1913 HELD UNCONSTITUTIONAL	10
APPELLANTS' CONTENTIONS	54
ARGUMENT ON MERITS	50
ARGUMENT ON MOTION TO REMAND	35
ARTICLE XV OF CONSTITUTION OF WASHINGTON	19
CONCLUSION	96
DECREE	31
ERRORS RELIED ON	33
HARBOR LINE COMMISSION ACT	18
HISTORY OF THE CASE	23
JURISDICTIONAL GROUNDS	6
PHYSICAL FACTS	8
PIERHEAD LINE	56
PLEADINGS, SUMMARY OF	25
POWERS OF PORT	24
QUESTION INVOLVED	5
RESERVATION OF WATERWAY FOR SALE AND LEASE	91
RIPARIAN RIGHTS IN WASHINGTON	67
SHORELAND CASES	82
STATE LEGISLATION	10
STATEMENT OF THE CASE	5
TIDELAND ACT	20
WATERWAY ACT OF 1890	14
WATERWAY ACT OF 1893	16

CASES

	Page
Aborn v. Smith, 12 R. I. 373	57, 65
Ala. G. S. R. Co. v. Thompson, 200 U. S. 206	48
Arkansas v. Kansas & T. Coal Co., 96 Fed. 353	48
Austin v. Bellingham, 69 Wash. 677	75
Beadleton v. Harpending, 32 Fed. 644	49
Berry v. Mobile & O. R. Co., 228 Fed. 395	49
Bilger v. State, 63 Wash. 457	75
Broadway Insurance Co. v. Chicago G. W. Ry. Co., 101 Fed. 507	49
Burrows v. Grays Harbor Boom Co., 44 Wash. 630	85
Commissioners Commercial Waterway Dist. No. 2 v. Seattle Factory Sites, 76 Wash. 181	76
Crehore v. Ohio & M. R. R. Co., 131 U. S. 433	48
Eisenbach v. Hatfield, 2 Wash. 236	65, 71, 72, 80, 81, 84, 87 and 95
Ex Parte Ayers, 123 U. S. 443	39
Ex Parte Young, 209 U. S. 123	45
Ferguson v. Ross, 38 Fed. 161	47
Fitzgerald v. Mo. Pac. Ry. Co., 45 Fed. 812	49

Gerhard v. Seekonk River Bridge Commissioners, 5 Atl. 199 66
Germania Insurance Co. v. Wisconsin, 119 U. S. 473 48
Grand Trunk Ry. Co. v. Twitchell, 59 Fed. 727 49
Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83 75
Hagood v. Southern, 117 U. S. 52 39
Harbor Line Commissioners v. State, 2 Wash. 530 ..... 79, 72
Hardin v. Jordon, 140 U. S. 371 68
Healy v. McCormick, 157 Fed. 318 49
Hill v. Newell, 86 Wash. 227 72
Illinois Central Ry. Co. v. Illinois, 136 U. S. 387 77
Jackson v. Allen, 132 U. S. 27 49
Key v. West Ky. Coal Co., 237 Fed. 258 49
Lankford v. Platte Iron Works, 235 U. S. 461 39
Louisiana v. Jumel, 107 U. S. 711 ..... 39, 44
Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542 72
Miller v. Mendenhall, 44 N. W. 1141 ..... 57, 64, 84
Miller v. Soule, 221 Fed. 493 49
Mo Kan. & Tex. Ry. Co. v. Hickman, 183 U. S. 53 ..... 46, 48
Muir v. Johnson, 49 Wash. 66 ..... 83, 88
Murray v. Wilson Distilling Co., 213 U. S. 151 39
Newell v. Loeb, 77 Wash. 182 ..... 72, 77, 93
Osborn v. Bank, 9 Wheat. 738 47
Pearl Oyster Co. v. Heuston, 57 Wash. 533 85
Phillips v. Western Terra Cotta, 174 Fed. 873 48
Prentis v. Atlantic Coastline Co., 211 U. S 210 45
Puget Mill Co. v. State, 93 Wash. 128 81
Re Eyers, 123 U. S. 443 47
Santa Clara County v. Goldy Machine Co., 159 Fed. 750 49
Scully v. Bird, 209 U. S. 481 45
Shane v. Butte Electric Ry. Co., 150 Fed. 801 49
Shively v. Bowlby, 152 U. S. 1 ..... 88, 95
Siclen v. Muir, 46 Wash. 38 ..... 83, 88
Smith v. Western Union Telegraph Co., 79 Fed. 132 49
St. Anthony Falls Water Power Co. v. Board of Water Com., 168 U. S. 349 68
State v. Sturtevant, 76 Wash. 158 ..... 82, 87
State v. Superior Court, 91 Wash. 454 63
State Ex Rel. Seattle v. Savidge, 95 Wash. 240 81
State Ex Rel. Ham Yearsley & Ryrie v. Superior Court, 70 Wash. 442 75
Stone v. South Carolina, 117 U. S. 430 38
Thompson v. Ward, 199 Fed. 861 48
United States v. Mission Rock Co., 189 U. S. 391 68
Weber v. Harbor Com'rs, 18 Wall. 57 68
West Side R. Co. v. Cal. Pac. R., 202 Fed 331 48
Wilson v. Oregon-Washington R. & Nav. Co., 71 Wash. 102 66
Yates v. Milwaukee, 10 Wall. 497 65

PORT OF SEATTLE, *Appellant*,

vs.

OREGON & WASHINGTON RAILROAD COMPANY and J. F. DUTHIE & COMPANY, *Respondents*.

STATEMENT OF THE CASE.

I. QUESTION INVOLVED IN THIS CASE:

Upon the merits this case involves the conflicting claims of the State of Washington (represented in this case by the appellant Port of Seattle) and the respondent Oregon & Washington Railroad Company to rights in a strip of waterway area within the boundaries of the East Waterway in the harbor of Seattle and lying between the West boundary of the Waterway and the United States Government pier head line in the Waterway.

Respondent railroad company owns a tract of filled tideland abutting upon the waterway, deriving its title under deeds to its grantors from the State of Washington. Respondent railroad company claims that by virtue of these deeds and the legislation of the State of Washington in force at the time of the purchase of the property from the

State by its grantors it is entitled to access from its property abutting upon the waterway across the waterway area to deep water in the waterway and to construct wharves upon the waterway area out to the pier head line.

Appellant, Port of Seattle, as representative of the State of Washington, claims that the respondent railroad company has no right in the waterway area and claims the right under Chapter 168 of the Laws of Washington of 1913 to give permits for the construction of wharves and other structures upon such waterway area and by such permits to require payment of the revenue provided by the State act therefor to the State of Washington.

II. JURISDICTIONAL GROUNDS:

The jurisdiction of this Court of this appeal arises by virtue of the allegation in paragraph five of the answer of respondent railroad company that the provisions of Chapter 168 of the Laws of Washington of 1913 impair the obligation of its contract by which it acquired said lands contained in the deeds of the State and the legislation of the State of Washington then in force as to the waterway and sale of the lands which are described in paragraph three of the answer; and also the allegation

of respondent railroad company in paragraph six of its answer that the said Chapter 168 of the Laws of Washington of 1913 deprives respondent railroad company of its rights under the said deeds without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

See Respondents' Answer, Record, pp. 25, 26, 27.

The contention of respondent railroad company was sustained by the decree of the trial Court, it being adjudged in the decree that the provisions of the said Chapter 168 of the Laws of Washington of 1913 (by typographical error specified in the decree as Chapter 169) are invalid because the same are in conflict with Section 10, Article 1 of the Constitution of the United States and with the 14th Amendment to said Constitution. (Record, p. 38.)

By typographical error the act of 1913, the validity of which is involved in this case and which is in fact Chapter 168 of the Laws of Washington of 1913, is referred to in the decree, exceptions and assignments of error as Chapter 169, but the act in question is clearly identified by title in respondent railroad company's answer (Answer, paragraphs 4, 5 and 6, Record, pp. 26 and 27), by title in the opin-

ion of the Court deciding the case (Record, p. 37), and in the decree itself, which though giving the erroneous chapter number describes the subject and provisions of the act. (Record, p. 38.)

III. PHYSICAL FACTS:

East Waterway is an artificial waterway, excavated by the State through tide lands in the harbor of the City of Seattle, the tide lands belonging to the State at the time the waterway was created. The waterway connects with the waters of Puget Sound and constitutes an arm of the sea, and both the site of the waterway and the lands abutting upon both sides of the waterway were originally covered by the ebb and flow of the tide and all situated a very considerable distance from any upland. At the time the waterway was excavated under contract by the State the abutting tide lands, including those owned by respondent railroad company, were filled from the excavation made under said contract. All of East Waterway is within the limits of the Port District known as the Port of Seattle.

The waterway, when constructed by the State, was not excavated to a navigable depth for the full width of the platted waterway, but was excavated

with sloping banks. A bulkhead was constructed upon the boundary line of the waterway on a one-to-one slope from the original tide flat level to the top of the bulkhead and from the toe or foot of the bulkhead excavation was made on a slope of four feet vertical to one perpendicular down to a point which would give thirty feet depth at low tide, this full depth not being quite reached at what is now the Government pier head line, one hundred and twenty-five feet from the property line or boundary line of the waterway, the bed of the waterway being exposed at low tide to a point about thirty-six feet from the property line. (Record, pp. 47, 48 and 49; Exhibit 6, Record, p. 83.)

Respondent railroad company owns a portion of Block 393, Seattle Tide Lands, abutting upon the west side of the East Waterway, the exact description of its property being found in paragraph one of the complaint. (Record, p. 4. See also Plaintiff's Exhibit 1, Record, p. 79.)

The waterway was laid out pursuant to the waterway act hereinafter set forth, and the abutting tide lands were platted by the King County Board of Appraisers under the tide land act hereinafter set forth. (Appellant's Exhibit 3, Record p. 80.)

IV. STATE LEGISLATION MATERIAL TO THE CASE:

Chapter 168 *of the Laws of Washington of* 1913.

The act held by the trial Court to be invalid as impairing the obligation of respondent railroad company's contract and as taking its property without due process of law was entitled: "An Act permitting and regulating the use of waterway areas between the boundaries thereof and government pierhead lines, and providing for the disposition of receipts therefrom." It was approved March 22, 1913, and is here quoted in full, as follows:

> SECTION 1. Whenever, in any waterways created under the laws of the State of Washington, the government of the United States shall have established pierhead lines in said waterway at any distance from the boundaries thereof established by the State, no structure shall be allowed in the strip of waterway between the boundary and the nearest pierhead line except by the consent of the State land commissioner and upon plans approved and terms and conditions fixed by him, and then only for such period of use as shall be designated by him, but any permit shall not extend for a longer period than thirty (30) years; *provided*, however, that the owner of land abutting upon either side of any such waterway shall have the right, if application be made therefor within a period of ninety (90) days following the date when this act shall go into effect, to obtain such a permit for a

thirty (30) year term, and every permit obtained by virtue of the exercise of such right shall provide that the area described therein or such reasonable portion thereof as shall be designated by the State land commissioner, having in view the requirements of the business proposed to be carried on thereon, shall be improved upon plans approved by the State land commissioner, the construction of such improvement to be commenced within such time as may be fixed in each case by the State land commissioner, such time to be in no case less than two (2) years from the date of such permit, to be completed within such reasonable time thereafter as the State land commissioner shall fix in each case, any of which times so fixed may be thereafter extended by him; the character of which improvements may be changed either before or after completion with the consent of the State land commissioner, but in all cases where the abutting owner or one claiming under him had prior to February 22, 1913, built upon such area, his improvements shall be recognized and accepted as sufficient compliance with the requirements of this act so far as concerns the area covered thereby, and as to uncovered area such improvements shall be given the same consideration as in other cases, and every permit obtained by virtue of the exercise of such right shall further provide that the annual rental to be paid shall be a sum equal to two per cent. of the assessed valuation for the year preceding the date of such permit of an equal area of adjoining or abutting shore or tide lands, exclusive of improvements thereon, and where the adjoining or abutting strip of shore or tide lands is of less width than the harbor area, a value proportional to said width; *provided fur-*

ther, however, that the foregoing provision fixing the rate of rental shall not extend beyond December 31, 1928, but all rentals after that date shall be subject to be controlled and fixed in the manner and by the public authority or authorities then provided by law for the same: *provided further,* that it shall not be necessary for any public corporation proposing to make use of any such strip of waterway to acquire by condemnation or otherwise the right hereby granted relating thereto, but nothing herein contained shall be construed to deprive any party to any such condemnation proceeding of any damages to which he would have been entitled if this act had not been passed. The State land commissioner shall require of the holder of every permit under this act a bond with sufficient surety, to be approved by said commissioner, in such penalty, and not exceeding twice the amount of the annual rental, but in no case less than five hundred dollars, as may be prescribed by said commissioner, conditioned for the payment of the rental reserved in the permit at or prior to the time of payment therein specified, during the term of such permit or during such part thereof as said commissioner in his discretion shall require to be covered by such bond; and in case only a part of the term of such permit shall be covered thereby, said commissioner shall require another like bond, to be executed and delivered within three months and not less than one month prior to the expiration of the period covered by the previous bond, covering the remainder of the term of the permit, or such part thereof as said commissioner in his discretion shall require to be covered thereby. The said commissioner shall have power at any time to summon sureties upon any bond and to ex-

amine into the sufficiency thereof, and if he shall find the same to be insufficient he shall require the holder of the permit to file a new and sufficient bond within thirty days after receiving notice to do so, under penalty of cancellation of the permit; and the said commissioner shall have power upon sixty days' notice to cancel any permit for a substantial breach by the holder thereof of any of the conditions thereof, or for lack of a bond therewith as herein required. In any case where such waterway shall be within the territorial limits of a port district organized under the laws of the State of Washington, the duties herein assigned to the State land commissioner shall be exercised by the port commission of such port district, and in every case the rentals received shall be disposed of as follows: Seventy-five (75) per cent shall be paid by the State treasurer to the county treasurer of the county wherein such port district is situated, for the use of said port district, and twenty-five (25) per cent. into the State treasury, except that in cases where the port district itself shall have constructed or shall own structures or improvements situate upon such strip of waterway the entire rentals for such improved strip of waterway shall be paid directly to such county treasurer for the use of such port district. Nothing herein contained shall confer upon, create or recognize in any abutting owner any right or privilege in or to any strip of waterway abutting any street and between prolongations of the lines of such street, but the control of and the right to use such strip is hereby reserved to the State of Washington, except that in cases situate in a port district such control and use shall vest in such port district." (Laws of Washington of 1913, pp. 582, 583, 584 and 585.)

Waterway Acts.

East Waterway was laid out by the Harbor Line Commission of the State of Washington pursuant to "An Act to establish and define public ways for watercrafts across the tide flats within, in front of and for a mile either way from all incorporated cities and towns in the State of Washington," approved March 28, 1890. As this Act is important to an understanding of the case, we quote it in full, omitting the title and enacting clause:

> "Section 1. There shall be established one or more public ways across all of the tide-flats that are situated within or in front of any incorporated city or town, or within two miles either way from any incorporated city or town within the State of Washington.
>
> Sec. 2. The public ways provided for in section one of this act shall not be less than fifty nor more than one thousand feet wide, and shall commence at the outer or deep-water end, in not less than twenty feet of water at low tide, and shall extend inland across the state's tide-lands.
>
> Sec. 3. The public ways above provided for shall be so located as to include, as near as is practicable, within their bounds, all navigable streams running through the tide-flats in which they are located, and at such other places as may be necessary for the present or future convenience of commerce.
>
> Sec. 4. All public ways established under the provisions of this act shall be well defined by posts, not less than eight inches in diameter,

firmly set or driven in the ground, and of sufficient length so that they will project above the water, at high tide, not less than four feet, and such posts shall not be over four hundred feet apart; and all such public ways shall be correctly surveyed and connected, by metes and bounds, with the government surveys, or such other permanent land marks as will make a lasting record; and a correct plat of all public ways so established shall be made, one copy of which shall be filed with the Secretary of State, one copy with the commissioner of public lands of the State, one copy shall be kept in the office of the chairman of the board of harbor line commissioners, and each county shall be furnished with a correct plat of all such public ways established within its borders, and such plats shall be filed as city or town plats are filed, and become a part of the county records.

Sec. 5. All the public ways that may be established under the provisions of this act are, and shall forever be, reserved from sale or lease as public ways for water crafts.

Sec. 6. Where the words "tide-flats or tidelands" are used in this act, they shall be construed to mean all lands over which the tide ebbs and flows, and which is bare at low tide; and where the words ordinary water crafts are used, they shall be construed to mean boats, barges and other water crafts drawing two and one-half feet and over of water.

Sec. 7. The board of harbor line commissioners are hereby authorized and instructed to carry out the provisions of this act, and they shall begin operations as soon as practicable after the passage and approval of this act; and they are hereby authorized to employ such assistance and procure such material as may be

necessary to carry out the full intent and purpose of this act, and the compensation for the same shall be such reasonable amount as said commissioners may deem advisable.

Sec. 8. All bills incurred in carrying out the provisions of this act shall be audited and paid in the same manner as is provided in the act creating the harbor line commissioners, for the payment of bills incurred by them." (Laws of Washington, 1889 and 1890, pp. 731 and 732.)

In 1893 the Legislature passed an act entitled, "An Act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the State, granting rights-of-way across lands belonging to the State," approved March 9, 1893, the parts material to this case of which are as follows:

"Section 1. The commissioner of public lands of the State of Washington may, when in his judgment the interests of commerce would be subserved thereby, enter into contract with any person or persons, or incorporated companies doing business in the State of Washington, for the excavation of any waterway or waterways through any lands belonging to the State of Washington, or to any citizen or corporation of said State, and for the filling in and raising above high tide of any tide or shore lands belonging to the State of Washington, and upon the completion of such contract such person or persons or incorporated company shall become entitled to and shall have a lien, as in

this act provided, upon all tide and shore lands belonging to the State of Washington, adjacent to such waterway, and remaining unsold at the date of the approval of this act, that they may fill in and raise above high tide, and all purchasers of said tide and shore lands from the State of Washington shall take the same subject to said lien. * * * *

Sec. 2. Said contract with the commissioner of public lands shall specify the waterway or waterways proposed to be excavated, and the lands to be affected thereby, and shall be accompanied by a map of the locality or localities showing said waterway or waterways, and their relation to the harbor lines and reservations in front of the cities or towns where the same are located, and shall show the tide and shore lands to be filled in and raised above high tide, properly designated and subdivided as nearly in accordance with the existing subdivisions of abutting uplands as the proper location of said waterway or waterways will permit, and shall specify and exhibit the waterway or waterways proposed to be excavated as to their depth and width and extent. * * * *

Sec. 7. All contracts provided for herein shall specify the character of all bulkheads and other restraining works and be accompanied by drawings and specifications of the same, and the commissioner of public lands shall be the judge of the sufficiency thereof, and of the minimum depth to which any waterway shall be excavated, in order to make the same useful for the purposes of commerce and navigation.

Sec. 9. All waterways excavated through any tide or shore lands belonging to the State of Washington by virtue of the provisions of this act, so far as they run through said tide or shore lands, are hereby declared to be public waterways, free to all citizens upon equal terms,

and subject to the jurisdiction of the proper authorities, as provided by law. * * * *

Sec. 10. If the commissioner of public lands shall determine to let any contract for the excavation of a waterway, as hereinbefore provided, the tide land appraisers appointed in the county in which said tide lands lie, shall forthwith appraise the tide lands which it is proposed to fill in by the excavation of such waterway, at their actual value at the time of letting such contract, and the said lands so appraised shall never be disposed of by the state for less than such appraised value."

Laws of Washington of 1913, pp. 241 to 246.

HARBOR LINE COMMISSION ACT.

The Harbor Line Commission was provided for by "An Act to create a board of harbor line commissioners, prescribing their duties and compensation," passed by the Legislature of the State of Washington and approved March 28, 1890. Sections 1 and 3 of this act, being all that are material here, are as follows:

"Section 1. There is hereby created a board of harbor line commissioners, to consist of five disinterested persons to be appointed by the governor.

Sec. 3. The duties of the said harbor line commissioners shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or

within one mile thereof upon either side, and to perform all other duties provided and prescribed in article 15 of the constitution of the State of Washington, and all such other duties as the law may prescribe, and wherever and whenever said harbor line commissioners shall have established the lines as herein provided, in any of the navigable waters of the harbors, estuaries, bays and inlets of this state, they shall file the plat thereof in the office of the Secretary of State and a duplicate thereof in the office of the clerk of the city or town where harbor lines shall have been located, and from and after the filing of said plat, the harbor lines established as therein and thereon designated, and displayed, shall be, and the same are declared to be, the harbor line of that portion of the navigable waters of this state."

Laws of Washington of 1899 and 1890, p. 239.

The Constitutional provision referred to in Section 3 of the Harbor Line Commission Act is contained in Section 1 of Article XV of the Constitution, as follows:

"ARTICLE XV.

Section 1. Harbor Line Commission and Restraint on Disposition of Certain Tide Lands. —The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate

limits of any city, or within one mile thereof upon either side. The State shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the State, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce."

1 Remington & Ballinger's Code of Washington, p. 111.

TIDE LAND ACT.

The same Legislature by an act approved March 26, 1890, entitled "An Act for the appraising and disposing of the tide and shore-lands belonging to the State of Washington" provided for the sale and appraisal of tide-lands, the material parts of which are as follows:

"Section 1. The tide and shore-lands in the State of Washington shall be appraised, and the same shall be disposed of by the commissioner of public lands as in this act provided, which are not by the constitution and laws of the State reserved from sale.

Sec. 2. There shall be a board of equalization, which shall be composed of five members, as follows: The secretary of state, the state

auditor, and three qualified electors, residents of counties of this State in which no tide-lands exist, who shall be appointed by the governor, and the same are hereby created a board of equalization and appeal as hereinafter provided, who shall serve for one year, or until their successors are appointed and qualified.

Sec. 3. The governor shall appoint, in each county of the State where shore and tide-lands exist, a board of appraisers, consisting of three disinterested resident freeholders, whose duty it shall be to examine and appraise the shore and tide-lands in their respective counties as hereinafter provided.

Sec. 4. For the purpose of survey and appraisal, the tide-lands of the State of Washington are hereby divided into three classes. The first class shall embrace all tide-lands situated within or in front of the corporate limits of any city, or within two miles thereof upon either side. * * * *

Sec. 5. Said board of appraisers shall meet at the county seat of their respective counties within thirty days after the location of the harbor lines in front of incorporated cities and towns, and, after taking an oath to support the constitution and the laws of Washington, and faithfully and impartially discharge their duties, shall organize by electing one of their number chairman and appointing a secretary. After the organization of the board as provided, they shall, within ninety days thereafter, examine, survey and appraise so much of the shore and tide-lands in their respective counties as lies within or in front of the corporate limits of any incorporated city or town, and within two miles thereof, upon either side, and thereafter, from time to time, such other lands as applica-

tion to purchase may render necessary, classifying the same and fixing the valuation of each lot, block, or tract separately, noting the improvements thereon and by whom claimed, and excluding the improvements from such valuation.

Sec. 6. Said board shall prepare plats showing all shore and tide-lands surveyed and appraised by them in their respective counties, on which shall be marked the location of all such lands, extending the lines of United States survey over the same, and shall prepare and keep in a well bound book a record of their proceedings, including a list of said shore and tide-lands and their appraisal of the same, which plat and book shall be in duplicate.

Sec. 7. When said board shall have discharged their duties as aforesaid, they shall deposit one copy of the plat and record as aforesaid with the county auditor in their respective counties, who shall file and safely keep the same in his office, and they shall deliver one copy of the plat and record to the state board of equalization.

Sec. 8. Any person, association or corporation entitled to purchase or hold real estate in the State of Washington, who shall desire to purchase under this act, may file with the commissioner of public lands an application to purchase any of the lands herein described, which application shall contain a description of the land applied for by metes and bounds. * * * *

Sec. 11. The owner or owners of any lands abutting, or fronting upon, or bounded by the shore of the Pacific Ocean, or any bay, harbor, sound, inlet, lake or watercourse shall have the right for sixty (60) days following the filing of the final appraisal of the tide-lands to purchase

all or any part of the tide-lands in front of the lands so owned: Provided, That if valuable improvements in actual use for commerce, trade or business have been made upon said tide-lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid.

Laws of Washington, 1889 and 1890, p. 431 et seq.

V. HISTORY OF THE CASE AT BAR.

The case at bar is in the nature of a suit to quiet the State's title to the waterway and area as against the claims asserted by the respondent railroad company that it has the right of access from its private property abutting upon the East Waterway across the waterway area to deep water in the waterway and that it has the right to build wharves and other structures upon the waterway area extending from its property abutting upon the waterway out to the pier head line in the waterway, and to establish the State's right, through its representative, the Port Commission, to give permits for the construction upon the waterway area of wharves and other aids to navigation and to collect the revenue therefor provided by the law of 1913 above quoted authorizing the Port Commission so to do.

The Port of Seattle is a municipal corporation organized under the laws of the State of Washington, having, among other powers, (including that conferred by Chapter 168 of the Laws of Washington of 1913 quoted above) the power:

> "to improve navigable and non-navigable waters of the United States and the State of Washington within the port district; to create and improve for harbor purposes new waterways within the port district; to regulate and control all such waters and all natural or artificial waterways (waterways of commercial waterway districts excepted) within the limits of such port district so far as and to the full extent that this state can grant the same, and remove obstructions therefrom; to straighten, widen, deepen and otherwise improve any and all waters, watercourses, bays, lakes or streams, whether navigable or otherwise, flowing through or located within the boundaries of such port district."

Laws of Washington, 1911, Sec. 4, p. 419.

Laws of Washington, 1913, Sec. 4, p. 212.

Laws of Washington, 1917, Sec. 4, p. 499 and 500.

All the powers of a Port District are exercised through its Port Commission.

Laws of Washington, p. 415, Sec. 3.

The respondent Oregon & Washington Railroad Company is a corporation under the laws of the State of Oregon and the respondent J. F. Duthie &

Company is a corporation organized under the laws of the State of Washington and claims as lessee under respondent railroad company. For the purposes of this appeal appellant concedes that the real controversy is between appellant and respondent railroad company and that respondent J. F. Duthie & Company is only a nominal party.

The suit was brought in the Superior Court of the State of Washington for King County.

The complaint alleges the corporate character of plaintiff and defendants; the execution of a three year lease (copy attached to complaint) in 1916 by defendant railroad company to defendant J. F. Duthie & Company of a strip of tide land, part of Block 393, Seattle Tide Lands, owned by defendant railroad company; that it abuts on East Waterway; the establishment of the Government pier head line in the waterway 125 feet from the line of defendant railroad company's property and that defendant railroad company claims jurisdiction over the waterway area between the line of its property and the pier head line; that defendant railroad company has no right, title or interest in the waterway area and has made no application to plaintiff for a permit for the use of said waterway area and none has been

granted by plaintiff, and that claims of defendant railroad company and of J. F. Duthie & Company as its lessee to the waterway area are unfounded; the issuance of a permit to defendant J. F. Duthie & Company by plaintiff for the use of the waterway (copy attached to complaint). (Complaint, paragraphs I to V, Record, pp. 1, 2.)

Paragraph VI of the complaint was stricken by order of the trial Court (Record, pp. 23, 24) and is therefore omitted in this statement.

The complaint concludes with a prayer (among other things not urged on this appeal) for a decree quieting its title to the waterway area as against the defendants except so far as claimed under the permit to respondent J. F. Duthie & Company, and for general relief. (Record, p. 3.)

Respondent railroad company filed its petition and bond for the removal of the case to the United States District Court for the Western District of Washington, Northern Division, and it was accordingly removed.

After its removal appellant moved that the case be remanded, which motion was denied and such denial is hereinafter fully discussed in the argument as one of the grounds for relief on this appeal.

After the removal of the case and the striking of paragraph VI of the complaint respondent railroad company filed its answer admitting all of the allegations of the complaint except the part stricken and except the allegations that the waterway area therein described is within the jurisdiction of plaintiff and that the defendant railroad company has no right, title nor interest therein, which allegations were denied, and except the allegation of the complaint as to the permit to the defendant J. F. Duthie & Company which was not denied. (Record, p. 24.)

Respondent railroad company affirmatively alleged in its answer that the waterway was established under the Act of March 28, 1890, (giving its title and being the Waterway Act set forth above in full in this brief); the filing of the plat of the waterway and tide lands by the Board of Harbor Line Commissioners, and that the pier head line was located and shown upon said plat and adopted by the War Department of the United States; that the waterway was excavated by the State of Washington under the Act of March 9, 1893, (see the material parts of that Act printed in full above in this brief); that the abutting tide lands were platted by the

State into blocks and lots; the purchase by the defendant railroad company's grantors in good faith and for a valuable consideration of the tide lands described in the complaint, and the ownership of defendant railroad company of the same with its appurtenances; that plaintiff claims jurisdiction over the waterway area by virtue of the Act of March 22, 1913, (being Chapter 168 hereinbefore printed in full); and that said Act in fact provides for the leasing of waterway area and collection of rental therefor; that defendant railroad company acquired its tide lands in reliance upon the permanent continuance of the waterway created as alleged and that said tide lands are chiefly valuable because of their accessibility to East Waterway and because of the riparian and shore rights appurtenant thereto, and that the acts and things done by the State in creating and establishing the waterway and declarations in the State legislative acts constituted contracts between the State and defendant railroad company and that said waterway, or any part thereof, would never be sold, leased or otherwise disposed of, and that said Act (Chapter 168) impairs the obligations of its contract in violation of Section 10, Article I of the Constitution

of the United States and Section 23, Article I of the Constitution of the State of Washington; that defendant's tide lands and other tide lands abutting upon the waterway are chiefly valuable by reason of their accessibility to said waterway and through it to the waters of Elliott Bay and Puget Sound; "that the right to navigate said waterway includes the right to come to, to land upon and to leave the shores abutting thereon, in the interest of commerce, not only to the abutting owners but to the public who may have business and ocupation with them or through them with each other, and as well the right to construct wharves, docks and piers, on the shores of and extending into said waterway in aid and promotion of navigation and commerce, provided that they do not extend beyond the pier head lines established and adopted as hereinbefore referred to, subject only to proper and reasonable control and regulation by the State of Washington and the United States in the public interest; and this defendant avers that the Act approved March 22, 1913, hereinbefore referred to, and the right or claim asserted by the Port of Seattle thereunder to lease the waterway area hereinbefore described for wharves and docks, and to collect, receive, and enjoy the rentals therefrom, and to deny and deprive

this defendant of the right to construct such wharves and docks, or to lease said area for such proper purposes and to receive and enjoy the rentals therefrom, deprives it of these rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Section 3, Article I of the Constitution of the State of Washington." (Record, pp. 25, 26 and 27.)

No evidence was introduced in support of the allegation in the third paragraph of the answer (see Record, p. 25) that the pier head line was shown on the plat filed by the Board of Harbor Line Commissioners.

The evidence was largely explanatory in character, the facts being not substantially disputed (except as to the pier head line appearing upon the Harbor Line Commissioners' plat which was alleged in the answer and no evidence introduced upon it), the questions involved being questions of law.

The plats introduced in evidence and contained in Volume 2 of the Record are enlightening as showing the situation and are explained by the testimony of the engineer witnesses. These exhibits will be referred to by reference to the Record so far as deemed material in the argument.

After the trial the Court rendered its opinion (Record, p. 32 et seq.) and thereafter entered its decree for the dismissal of the complaint, which decree for convenience we here print in full, omitting formal parts:

"DECREE.

This case having come on to be heard upon the pleadings and the evidence introduced in open court, and arguments of solicitors both on behalf of the complainant and the defendants having been heard, and the cause duly considered, the court finds:

That the complainant has no proprietary rights or interests in the water area between the shore line and the pier-head line in front of the lots owned by the defendant, Oregon & Washington Railroad Company, described in the pleadings herein, and is not entitled to lease the same, nor to deprive the defendant, Oregon & Washington Railroad Company, of access to the navigable waters of said waterway over said water area; and that the provisions of Chapter 169 of the Laws of Washington of 1913, providing for such leasing and collection of revenue therefor, are invalid because the same are in conflict with Section 10, Article 1 of the Constitution of the United States and with the XIVth Amendment to said Constitution.

That the defendant Oregon & Washington Railroad Company has no proprietary interest in said water area, but as the owner of the abutting lots is entitled to access to and from said lots to and from the deep or navigable waters

of said waterway across said water area, subject to proper Governmental supervision.

The court further finds that the State has never established any harbor lines in said waterway, but does not adjudicate upon the right of the State to hereafter establish harbor lines therein or the effect the establishment of such harbor lines would have upon the rights of the parties hereto in such waterway.

The court being of the opinion that complainant is not entitled to any equitable relief herein;

It is ordered and decreed that said bill of complaint be, and the same is, hereby dismissed, without costs to either party." (Record, pp. 38 and 39.)

Exceptions were duly taken by appellant to the denial of the motion to remand, to each portion of the decree and to the refusal of the Court to enter a decree for appellant, and appellant's exceptions are found at pages 39 and 40 of the Record.

Appellant thereafter duly took its appeal to this Court and assigned errors upon the denial of appellant's motion to remand to the State Court, to the refusal of the trial Court to enter a decree for complainant, and to each separate finding and provision of the decree actually entered. (Record, pp. 71 and 72.)

Although the decree of the Court that the State of Washington has never established any harbor lines in the East Waterway was excepted to and error assigned thereon by appellant, we make no point upon this appeal as to that portion of the decree, conceding for the purposes of this case that the State never has established any harbor lines in the waterway.

The assignments of error relied upon on the appeal are as follows:

"I.

That the District Court of the United States for the Western District of Washington, Northern Division, erred in denying complainant's motion to remand the above entitled cause to the Superior Court of the State of Washington for King County.

II.

That said District Court erred in failing and refusing to enter a decree for complainant as prayed for in complainant's complaint in the above entitled cause.

III.

That said District Court erred in entering a decree in said cause finding and decreeing that complainant has no proprietary rights or interests in the water area between the shore line and the pier-head line in front of the lots owned by the defendant Oregon & Washington Railroad Company, described in the pleadings in said cause.

IV.

That said District Court erred in finding and decreeing that complainant is not entitled to lease the waterway area between the shore line and the pier head line in front of the lots owned by the defendant Oregon & Washington Railroad Company, described in the pleadings herein.

V.

That said District Court erred in finding and decreeing that complainant is not entitled to deprive the defendant Oregon & Washington Railroad Company of access to the navigable waters of said waterway over said waterway area.

VI.

That said District Court erred in finding and decreeing that the provisions of Chapter 169 of the Laws of Washington of 1913, providing for leasing of said waterway area and collection of revenue therefor, are invalid, because the same are in conflict with Section 10, Article I of the Constitution of the United States and with the Fourteenth Amendment to said Constitution.

VII.

That said District Court erred in finding and decreeing that the defendant Oregon & Washington Railroad Company as the owner of the abutting lots is entitled to access to and from said lots to and from the deep or navigable waters of said waterway across said waterway area subject to proper Governmental supervision.

IX.

That said District Court erred in finding and adjudging in the said decree that complainant is not entitled to any equitable relief in the above entitled cause.

X.

That said District Court erred in decreeing that the bill of complaint in the above entitled cause be dismissed."

(Record, pp. 71 and 72.)

The discussion of the errors assigned, other than the first assignment which related to the denial of appellant's motion to remand, will be combined, as they all relate to the one question as to the ownership and rights in the waterway area in the East Waterway between the pier-head line and the property line.

ARGUMENT.

The Court Erred in Denying the Motion to Remand to the State Court.

This cause was removed from the State Court to the United States District Court on respondents' petition.

The sole ground of removal was diversity of citizenship.

See Petition for Removal, Record, p. 13-15.

While there is a Federal question in the case, it did not appear in either the complaint, petition for removal, or elsewhere in the record in the State Court, but was first raised in the answer filed in the Federal Court.

See Record of State Court, Record, p. 1-17.

See Answer, Paragraphs V and VI, Record, pp. 26, 27.

The motion to remand was made on three grounds. We only urge one on this appeal, being the third ground specified in the motion to remand, as follows:

> "Because the State of Washington is the real party in interest as plaintiff in this action, the nominal plaintiff, the Port of Seattle, a municipal corporation, being merely the agent and representative of the State of Washington in the granting of permits or leases of waterway areas and harbor areas within said Port District; and the State of Washington being the real party in interest, said cause is not within the jurisdiction of the above entitled District Court of the United States." (Record, p. 19.)

The appellant duly excepted to the order denying the motion to remand. (Record, p. 23.)

And assigned error thereon on this appeal. (Assignment of Error No. 1, Record, p. 71.)

This cause is a proceeding in the nature of an action to quiet the title of the State of Washington to a parcel of waterway area as against the claims of the respondent Oregon & Washington Railroad Company, the complaint alleging as the basis of its right to maintain the suit that "the waterway area * * * * is within the jurisdiction of the plaintiff acting for and on behalf of the State of Washington." (See Complaint, Paragraph IV, Record, p. 2.)

Under the terms of the Act of the State of Washington providing for the giving of permits for the improvement and use of waterway areas inside of the pier-head lines (quoted in full in the statement of the case herein) the authority to give such permits is conferred upon the State Land Commissioner, followed by the provision that:

> "In any case where such waterway shall be within the territorial limits of a port district organized under the laws of the State of Washington, the duties herein assigned to the state land commissioner shall be exercised by the port commission of such port district, and in every case the rentals received shall be disposed of as follows: Seventy-five (75) per cent. shall be paid by the state treasurer to the county treasurer of the county wherein such port district is

situated, for the use of said port district and twenty-five (25) per cent. into the state treasury. * * * *"

Laws of Washington of 1913, p. 582, 584.

The statute makes the State Land Commissioner the State agency as to waterway areas not within port districts and all rentals therefor are to be paid into the State Treasury.

As to waterway areas within port districts there is no difference, except that "the duties herein assigned to the State Land Commissioner shall be exercised by the Port Commission." It is true that in the latter case the State Treasurer pays part of the money received from rentals of the State's waterway areas to the Port. But the property involved is the State's property, the rentals received are paid to the State and the appellant through its Commission is simply performing as the State's agent the same duties with reference to this waterway area that are performed by the State Land Commissioner as to other waterway areas.

We submit, therefore, that the suit is one involving the rights of the State of Washington, is brought for its benefit, and that the State is the

real party and that the appellant appears solely in a representative capacity.

It is well settled that this Court will, for the purpose of determining jurisdiction, determine who is the real party in interest, so far as the same appears in the record, and if the real party is a State, and the nominal party but a representative thereof, jurisdiction in the Federal Court will be held not to exist. If the suit is brought against one who is merely a representative of the State, the State will be treated as the real party and jurisdiction denied by force of the Eleventh Amendment. If the suit is brought by a representative of the State, the State will be treated as the real party, and as a state is a citizen of no state, jurisdiction will be denied, so far as it depends on the diversity of citizenship.

Murray v. Wilson Distilling Co., 213 U. S., 151, 29 Sup. Ct. Rep., 458.

Lankford v. Platte Iron Works, 235 U. S., 461, 35 Sup. Ct. Rep., 173.

Ex Parte Ayers, 123 U. S., 443, 8 Sup. Ct. Rep., 164.

Hagood v. Southern, 117 U. S., 52, 6 Sup. Ct. Rep., 608.

Louisiana v. Jumel, 107 U. S., 711, 746, 2 Sup. Ct. Rep., 128.

In the case of *Murray* v. *Wilson Distilling Company* above cited the action arose under the State Dispensary Act of South Carolina. The State had passed an act to provide for winding up the affairs of the State dispensary system, providing for a commission to be appointed by the Governor to collect the assets, pay the liabilities and pay the balance into the State treasury. A suit was brought in the Federal Court against the commissioners, the jurisdiction of the Court being based upon diversity of citizenship just as it is in the case at bar. The suit was based upon the theory that the law of the State of South Carolina had placed the dispensary funds in the hands of the commissioners as a trust fund and it was claimed that they were not discharging their duties and an injunction was sought against further disposition of the fund and the appointment of a receiver of the fund. Mr. Justice White rendered the opinion of the Court and it was held that the funds were State funds, that while the State was not named as a party defendant the defendants in fact represented the State and that the suit was in fact one against the State and within the inhibition of the Eleventh Amendment to the Constitution.

The case of *Lankford* v. *Platte Iron Works* above cited was a suit in equity against the Oklahoma State Banking Board. Under the law of Oklahoma there is a provision for a bank depositors' guaranty fund created by an assessment upon banks and administered by the Oklahoma State Banking Board, created by the State. The Board had taken charge of the assets of a bank for the purpose of winding up its affairs and the complainants, claiming to be creditors, conceiving that the Banking Board was not performing its duty, brought the suit to obtain a decree against the Board requiring it to issue certain certificates of indebtedness provided for by the law and to make assessments to provide for their payment and for general relief. The defendants moved to dismiss the suit for want of jurisdiction as being one against the State of Oklahoma in violation of the Eleventh Amendment.

The case was decided by a majority of the Supreme Court, Justice McKenna delivering the opinion of the Court which was concurred in by Chief Justice White and Justices Holmes, Hughes and McReynolds. The dissenting opinion was rendered by Justice Pitney, with whom concurred Justices Day, Van Devanter and Lamar.

By the majority opinion it was held that the suit was a suit against the State of Oklahoma although not named as a party and jurisdiction was held not to exist and the cause dismissed.

It is to be noted, however, that the ground of the dissenting opinion is that under the Oklahoma law the State has no property interest in the guaranty fund, Mr. Justice Pitney saying in his opinion that:

> "It seems to me clear that, by the language and evident meaning of this law, the state has no property interest in the guaranty fund. No part of it is raised through general taxation, nor can any part of it be lawfully placed in the treasury of the State, or devoted to any of the ordinary purposes of the government, or to any purpose other than the payment of depositors. The State, it is true, through the banking commissioner, holds the bare legal title to the fund, and enforces in the name of the State the liabilities of the failed banks, but this is done for the sole benefit of the fund. Thus, the State has title only, but without real ownership. Not even is the credit of the State pledged for the success of the scheme, for while Section 8 permits banks to display an official certificate of compliance with the law, the certificate declares that safety to the depositors is guaranteed not by the State, but by the depositors' guaranty fund, and it is made a misdemeanor for any bank officer to advertise the deposits as guaranteed by the State. It would, I think, be dif-

ficult to find language more clearly showing that the State is neither interested in the fund nor responsible to the depositors with respect to it."

Lankford v. Platte Iron Works, 235 U. S., 461, 35 Sup. Ct. Rep., 173, at 178.

Applying the doctrine of the foregoing cases to the case at bar, we submit that it is clear that this proceeding is one brought on behalf of the State. It will not be denied that the title to the waterway areas is vested in the State. The suit is brought for the purpose of quieting the State's title, basing the right of the Port to bring the action on behalf of the State upon the powers conferred upon the Port as the representative of the State both in the Port Act from which we have quoted in the statement of the case and in Chapter 168 of the Laws of Washington of 1913 which has been set forth in full.

While it is true that under the terms of Chapter 168 of the laws of 1913 when the State has collected the rental of the waterway areas involved a portion of the money is paid to the Port and a portion kept in the State Treasury, the property rented is the State's property, the money collected is the State's money and is paid into the State treasury and

such disposition made by the State Treasurer as the law directs.

In *Louisiana* v. *Jumel*, 107 U. S., at 722, above cited, the suit being one against the State Treasurer on behalf of bond holders who claimed to be entitled to receive certain moneys paid into the State Treasurer's hand, the Court said:

> "The treasurer of state is the keeper of the treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax-collectors and paid over to him, that is to say, into the State treasury, just as other taxes were when collected. He is no more a trustee of these moneys than he is of all other public moneys. He holds them, but only as the agent of the State. If there is any trust, the State is the trustee, and unless the State can be sued the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the State, but not the State through them."

So, in the case at bar, the Port Commission is authorized to give permits for the use of the State's

waterway, and to act for the State in controlling the waterway and to collect revenue for the State—but its function is only to perform State duties under State laws.

Cases like *Ex Parte Young,* 209 U. S., 123, 28 Sup. Ct. Rep., 441, and *Scully* v. *Bird,* 209 U. S., 481, 28 Sup. Ct. Rep., 597, and many cases of similar character involving suits brought against State officers who are attempting against the plaintiff to enforce an unconstitutional law and in which it is held the State is not a party, are not contrary to the doctrine contended for in this case, the ground of the decision being, as stated in the syllabus of the Young case, that the State officer's "act in attempting in the name of the State to enforce a void enactment is merely illegal because in conflict with the superior authority of the Federal Constitution and he is stripped of his official character and the prohibition against his proceeding does not, therefore, affect the State in its governmental capacity."

Nor do those cases in which it is sought to enjoin railroad or other rate fixing public service commissions from action prejudicial to a complainant, like the case of *Prentis* v. *Atlantic Coastline Co.,* 211 U. S., 210, 29 Sup. Ct. Rep., 67, and *Mo., Kan.* &

Tex. Ry. Co. v. *Hickman,* 183 U. S., 53, 22 Sup. Ct. Rep., 18, conflict with the position taken in this case. The principle upon which those cases are based is that the State is not in fact the real party in interest. As the Court says in the case last cited:

> "It is not an action to recover any money for the State. Its results will not inure to the benefit of the State as a state in any degree. It is a suit to compel compliance with an order of the railroad commissioners in respect to rates and charges. The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the commissioners. They are the real parties in interest, and in respect to whom the decree will effectively operate."
>
> Mo., Kan. & Tex. Ry. Co. v. Hickman, 22 Sup. Ct. Rep., at 21.

The case from which we have just quoted was one brought as plaintiff by a State officer in a State Court and removed into the Federal Court on the ground of diversity of citizenship. In discussing the question of whether it could be so removed, the Court said:

> "Was the State the real party plaintiff? It was at an early day held by this court, construing the Eleventh Amendment, that in all cases where jurisdiction depends on the party it is

the party named in the record. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204. But that technical construction has yielded to one more in consonance with the spirit of the amendment, and in *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164, it was ruled upon full consideration that the amendment covers, not only suits against a state by name, but those also against its officers, agents, and representatives where the State, though not named as such, is nevertheless the only real party against which in fact the relief is asked, and against which the judgment or decree effectively operates. And that construction of the amendment has since been followed. That amendment refers only to suits brought against a state. But applying the same principles of construction to the removal acts and to cases in which it is claimed that the state, though not the nominal, is in fact the real, party plaintiff, it may fairly be held that the state is such real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate. Such a case was *Ferguson* v. *Ross*, 3 L. R. A., 322, 38 Fed. 161. There an action was brought in the name of Ferguson, a shore inspector, against Ross and others, to recover a penalty. The statute of New York authorized the suit to be prosecuted in the name of the inspector, but all the moneys recovered were payable into the treasury of the state, and it was held by the circuit court for the eastern district of New York that the action was one in which the real party plaintiff was the State. It was for its sole benefit that the action was brought, and it alone was to be benefited by the recovery."

Mo., Kan. & Tex. Ry. Co. v. Hickman, 183 U. S. 53, 22 Sup. Ct. Rep., 20.

Ferguson v. Ross, 38 Fed. Rep. 161, 3 L. R. A. 322.

That a State is not a citizen of any State, and that a suit brought by a State cannot be removed to the Federal Court on the ground of diversity of citizenship, see

Stone v. South Carolina, 117 U. S. 430, 433.

Germania Insurance Co. v. Wisconsin, 119 U. S., 473.

Arkansas v. Kansas & T. Coal Co., 96 Fed. Rep. 353.

The right to remove a case from the State to the Federal Court is determined solely upon the face of the record made in the State Court, and if an inspection of that record does not disclose ground for removal it must be remanded.

Crehore v. Ohio & M. R. R. Co., 131 U. S., 433, 9 Sup. Ct. Rep. 692.

Ala. G. S. R. Co. v. Thompson, 200 U. S., 206, 26 Sup. Ct. Rep. 161, 164.

West Side R. Co. v. Cal. Pac. R., 202 Fed. Rep. 331, 333.

Phillips v. Western Terra Cotta, 174 Fed. Rep. 873.

Thompson v. Ward, 199 Fed. Rep. 861.

Key v. West Ky. Coal Co., 237 Fed Rep. 258.

Smith v. Western Union Telegraph Co., 79 Fed. Rep. 132.

Berry v. Mobile & O. R. Co., 228 Fed. Rep. 395.

Beadleton v. Harpending, 32 Fed. Rep. 644.

And the Federal Court cannot retain jurisdiction of a case improperly removed on the ground of diversity of citizenship even though a Federal question is raised in the case after its removal to the Federal Court.

Crehore v. Ohio & M. R. R. Co., 131 U. S. 433, 9 Sup. Ct. Rep. 692.

Jackson v. Allen, 132 U. S. 27, 10 Sup. Ct. Rep. 9.

Healy v. McCormick, 157 Fed. Rep. 318.

Fitzgerald v. Mo. Pac. Ry. Co., 45 Fed. Rep. 812, 814.

Shane v. Butte Electric Ry., 150 Fed. Rep. 801 at 813.

Broadway Insurance Co. v. Chicago G. W. Ry. Co., 101 Fed. Rep. 507.

Santa Clara County v. Goldy Machine Co., 159 Fed. Rep. 750.

Grand Trunk Ry. Co. v. Twitchell, 59 Fed. Rep. 727.

Miller v. Soule, 221 Fed. Rep. 493.

ARGUMENT ON THE MERITS.

Upon the merits this case turns upon the question as to the ownership and rights existing in that part of the East Waterway situated between the boundary line of respondent railroad company's property and the pier-head line in the East Waterway, which strip is called waterway area in Chapter 168 of the Laws of Washington of 1913, which we have quoted in full in the statement of the case.

It is not disputed that East Waterway and the abutting property owned by respondent railroad company as appurtenant to which respondent railroad company claims rights in the waterway area are wholly situated below the line of mean high tide in the harbor of Seattle as it originally existed; that all these tide lands were owned by the State of Washington and that whatever rights respondent railroad company may have in the waterway area it has by virtue of the purchase from the State by its grantors of the property abutting upon the East Waterway. We also understand it to be respondent's position that the State of Washington in laying out East Waterway and providing for its excavation and in selling the abutting tide lands had full

power to create in the purchasers of such abutting tide lands rights of wharfage and access to the navigable waters of East Waterway or to exclude such purchasers from any rights therein and in all respects to create or withhold such rights in East Waterway as should be determined by the State.

Respondents contend, however, as we understand their position, that the waterway having been created by the State as a public waterway and by the terms of the act under which it was created being expressly reserved from sale or lease as a public way for water craft, that the waterway was thereby created a highway and purchasers of the abutting State lands, by virtue of their purchase of such lands upon the waterway, were as a matter of law entitled to access to the navigable water of the waterway and to wharf out to deep water. We understand also that respondent claims that the fact of a pierhead line being marked upon the original plat of the tide lands by which respondents' grantors bought indicated an intention that the purchasers from the State of abutting State lands should have a right to access and to wharf out.

It is further respondents' contention that, purchase having been made from the State under these

circumstances, Chapter 168 of the Laws of Washington of 1913, which we have above quoted in full and which provided for giving permits to third persons for the use of the waterway area for the construction of wharves and other purposes, is invalid under the United States Constitution as impairing the obligation of the contract between the State and respondents' grantors created by the waterway and tide-land acts taken together with the grants of the property by the State to respondents' grantors, and as taking respondents' property without due process of law.

In the opinion filed below by the trial Court certain of its language appears to deny to respondent railroad company the right to construct wharves or other structures upon the waterway area (Record, p. 37) and to indicate that it was the opinion of the Court that the State might construct or authorize the construction of piers upon the waterway area and that such action would not infringe any right of the riparian owner. (Record, p. 35.)

On the other hand, the Court quotes certain language from the case of *State* v. *Sturtevant*, 76 Wash., 158, at page 166, and apparently holds that respondent railroad company has a vested right in

access from its abutting property to navigable water in the waterway (Record, p. 37), and also quotes language from the same case suggesting the right to wharfage in respondent (Record, p. 38), though this seems to be contrary to statements contained in the earlier portion of the opinion.

The Court finally concludes in the opinion that the lease given by the respondent railroad company to the respondent J. F. Duthie & Company (for shipyard purposes) and the permit given by the appellant to the same lessee for the same purposes were not for purposes to which the waterway area could be devoted by either party and directed the dismissal of the suit on the theory that appellant was at fault and must purge itself of fault before it could have standing in a Court of equity. (Record, p. 38.)

It will be seen, however, by reference to the decree which we have above quoted in full that the decree was not based upon the latter ground but upon the theory that appellant has no proprietory right or interest in the waterway area and is not entitled to lease it nor to deprive respondent railroad company of access to the navigable waters of the waterway over the waterway area and that the provisions

of Chapter 168 of the Laws of Washington of 1913 providing for the leasing of waterway area and the collection of revenue therefor are invalid upon the two grounds above referred to. The decree further affirmatively decrees a right of access in the respondent railroad company from its private property across the waterway area to navigable waters.

Appellant's contentions on this appeal are:

1. The State, prior to 1913 when Chapter 168 was passed, never in fact fixed or recognized any pier-head line in the East Waterway and the marking of the pier-head line on the tide land appraiser's plat was without any authority of law and respondents' grantors in buying from the State did not and could not rely upon such a line as creating or indicating the creation of any rights in the waterway.

2. The sale by the State to respondents' grantors of the property abutting upon East Waterway carried with it no vested right of any kind in the waterway or in its use, either for access or wharfage.

3. The State, notwithstanding the declaration in the Waterway Act that the waterways created thereunder "are and shall forever be reserved from

sale or lease as public ways for water craft," retained as against the abutting land owners and all the world the right to deal with, change, modify or vacate the waterway and all areas within its boundaries, and Chapter 168 of the Laws of Washington of 1913 was a valid exercise of the State's sovereign power, and that the Act of 1913 in fact was passed for the purpose of providing wharves and other structures to make the waterway available for its primary uses.

4. The respondent railroad company, not having exercised the preference right to wharfage given by Chapter 168 of the Laws of 1913 within the time therein provided, has no right of any kind in the waterway area.

5. The decree of the lower Court should be set aside and (unless the case is remanded to the State Court as we contend it should be) a decree should be entered quieting the title of the State of Washington, and that of appellant as its representative, in and to the waterway area as against the respondent railroad company and decreeing that respondent railroad company, as the owner of the tide land abutting upon said waterway area, has no right, title or interest in said waterway area, or any part

thereof, and enjoining the respondent railroad company from claiming or exercising any right in or jurisdiction over the waterway area referred to.

I.

THE PIER-HEAD LINE ON TIDE LAND PLAT IS NOT AVAILABLE TO RESPONDENT IN SUPPORT OF RESPONDENT'S CLAIMS.

We do not, of course, know what position the respondent railroad company will take upon this appeal in support of its claims to the waterway which is the subject of the controversy. In respondent's brief filed in the Court below counsel for respondent says:

> "If there had been no pier-head line designated on the plat of these waterways by the State at the time of their creation, it could plausibly be argued that the grant by the State of the adjoining lots by numbers would not convey any right to wharf out into the waterway, under the rule that a grant by a sovereign State is construed most strongly against the grantee. But where the State has established such a line marking the line of navigability, it is universally held, so far as our investigations show, that the establishment of such a line is an invitation and concession to the shore owner to

wharf out to it, and that a grant by the State of the abutting land carries with it the right to wharf out to such established line, in the absence of any legislation of the State to the contrary."

It was followed by a citation of the cases of *Aborn* v. *Smith*, 12 R. I., 373, and *Miller* v. *Mendenhall*, 44 N. W., 1141.

We assume that respondent's position on this appeal will be the same.

This position, however, is not supported by the record in the case. An examination of the Waterway Act, which is hereinbefore printed in full, and of the Harbor Line Commission Act fixing the powers and duties of the Harbor Line Commission, the material parts of which are set forth in the early part of this brief, will show that there is no provision made authorizing the Harbor Line Commission, or anyone else, to establish or fix pier-head lines in any plat of the waterway. The Harbor Line Commission was directed to lay out the waterways and set posts along their outer boundaries, to survey and plat them and connect them with the Government surveys and to file the plats, and the waterways as so marked out as a whole were, so far as the terms of the Waterway Act are concerned, reserved from

sale or lease as public ways for water craft. It was further provided in the Act that where the words "ordinary water craft" are used they shall be construed to mean boats, barges and other water craft drawing two and one-half feet and over of water. (See Section 6 of Waterway Act.)

Not only is no authority found anywhere in the laws of the State of Washington authorizing the Harbor Line Commission, or anyone else, to plat or fix a pier-head line in any waterway, but there is nothing in the record to indicate that they ever attempted so to do. The pier-head line appears upon appellant's exhibit 1 (see Record, Vol. II, p. 79). The certificate upon this plat shows that it is a copy of those portions of plates 32, 33, 36, 37, 41, 44, 45, 46, 47 and 48, Seattle Tide Lands, lying adjacent to the East Waterway, said plates being found in Vol. II, Seattle Tide Lands, filed in the office of the Board of State Land Commissioners, March 15, 1895. So far as this plat, therefore, indicates where the pier-head line upon the plat came from it appears that it came from the plats filed of Seattle Tide Lands.

By reference to exhibit 3 (see Vol. II of Record, p. 80) it appears that exhibit 3 also shows the pier-head line upon the East Waterway. Exhibit 3, as

identified in the testimony of the witness Blackwell, (Record, p. 42) is the index sheet of plats covering the tide lands, as filed in King County, and, as the witness testified, exhibit No. 1 shows two or three (portions of ten the certificate to exhibit 1 indicates) of the same plats put together in one map. Exhibit 3 in fact is the general plat or index sheet showing a general view of the Seattle Tide Lands and which was attached to plats Nos. 26 to 56 of the Seattle Tide Lands made by the King County Board of Appraisers under the Tide Land Act.

We do not believe, notwithstanding the allegations of the answer, that counsel for respondent will contend that the plat of East Waterway filed by the Harbor Line Commissioners, and who alone were authorized to plat waterways, (though they had no power to fix pier-head lines or do anything having to do with operation of the waterway when so platted) contains any pier-head line. It does not in fact, though, as a copy of that plat is not in the evidence, this Court cannot pass upon the fact. However, respondent has the affirmative of the issue upon the proposition alleged in his answer that the contract he has with the State has been impaired by Chapter 168 and if he contends for any rights

based upon the plat of the Harbor Line Commission the burden was certainly upon the respondent railroad company to get such a plat, if any had ever existed, into the record.

It does appear, however, that a pier-head line was sketched in by the Tide Land Appraisers who had authority to plat the tide lands. They did not, however, have any authority whatever to deal with waterways, their authority being limited strictly to platting the tide lands which were subject to sale and it is obvious, the East Waterway being reserved from sale by the Waterway Act, that the platting of any lines within the East Waterway was wholly outside of their powers. This will, of course, clearly appear by reference to the Tide Land Act, the material portions of which we have heretofore printed in this brief.

The reason the pier-head line was placed on the plat by the Tide Land Appraisers (though improperly, of course, it being outside of their powers) would appear to be that prior to the filing of their plat on March 15, 1895, the United States War Department had in fact fixed the pier-head line in East Waterway. (See Blackwell's testimony, Record, p. 42.)

The statement contained in paragraph IV of the complaint (see Record, p. 2) that "the State of Washington and the United States Government have established in said East Waterway a distance of 125 feet from the shore-line of the premises herein described a pier-head line" must be construed as referring to the fact that the Waterway Area Act of 1913, being Chapter 168 involved in this suit, refers to the pier-head line fixed by the United States Government as being the boundary of the waterway areas dealt with in that chapter, the pier-head line being recognized, so far as our search of Washington laws has disclosed, first in that Act, and also the fact of the moving back of the 250 foot pier-head line as originally fixed by the War Department on November 17, 1894, and thereafter moved back in 1914 to 125 feet from the property line. (See Blackwell's testimony, Record, p. 42.)

This change of the pier head line appears to have been made by the War Department at a hearing in which the property owners and the Port Commission participated. (See testimony of Nicholson, Record, pp. 55 and 56.)

It will be remembered that under the Port Act jurisdiction of the waterways was vested first in the

Port in 1911 and the change of the pier head line was made three years later, in 1914.

The matter of the location of pier head lines is committed by the United States Government to the War Department. (30 U. S. Statutes at Large, ch. 425, sec. 11, p. 1151.)

It therefore appears that, so far as the respondent railroad company relied upon a pier head line in the East Waterway, it was a pier head line established by the Federal Government and no State action fixing it prior to the purchase of the property by respondent railroad company appears. It does appear that the Port Commission, as a representative of the State, did, in 1914, many years after the grant, join in a proceeding to get the War Department of the United States Government to change the line and that the United States pier head line was recognized in 1913 by the Legislature in chapter 168, and it does appear that the Tide Land Appraisers who made the plat of the tide lands sketched in the Government pier head line on their plat. No authority, however, to deal with that pier head line as a part of the plat appears in the Tide Land Act, and that the tide lands embraced within the limits of the waterway were not subject to their jurisdic-

tion for the purpose of platting and appraisement, see *State vs. Superior Court*, 91 Wash., 454.

In that case there was involved the question of the right of a railroad corporation to condemn tide lands embraced in a waterway which had not been excavated and the Court held that where tide land had been appropriated to waterway or other public uses they would not be included under the terms of the statute providing for sale or condemnation of tide lands.

It is therefore clear that when under the Tide Land Act provision was made for the platting and sale of the State's tide lands that tide lands embraced within the limits of waterways were excluded and that the placing of the pier head line theretofore established by the Federal Government in the East Waterway upon the plat made by the King County Tide Land Appraisers in their plat of the tide lands was wholly outside of their authority, and no rights could be predicated thereon by any purchaser of tide lands abutting upon the waterway.

Respondent's theory, therefore, that the appearance of the pier head line upon the plat was an indication that the State intended that purchasers of lots abutting upon the waterway should have the

right to wharf out to the pier head line is shown to be without foundation.

The cases cited by counsel for respondents upon the hearing below to support its position that the pier head line upon the plat indicated an intention on the part of the State that its purchasers were given the right to wharf out to such pier head line do not, we submit, have any force in view of the fact, which we think clearly appears, that there was no plat upon which any such pier head line was shown by any authority binding upon the State. Not only so, but the cases themselves, upon examination, have no weight when applied to the situation in the State of Washington, as will readily appear by an examination of the cases.

The case of *Miller v. Mendenhall*, 44 N. W. 1141, was a case involving the question of riparian rights as between private parties, the question being not whether the State had conveyed riparian rights, but as to who owned such rights as existed as between parties other than the State. It appears, also, in the case that a harbor line had been established by the city under legislative authority. The rights involved were riparian rights on a fresh water lake. The case was largely based upon the decision of this

Court in *Yates v. Milwaukee*, 10 Wallace, 497, which latter case is distinguished by the Supreme Court of the State of Washington in the case of *Eisenbach v. Hatfield*, 2 Wash. 236, 247, 248, as being a case upon non-tidal waters and involving rights to an existing wharf, as our State Supreme Court says in reviewing the case, built presumably by the State's license. In fact, the doctrine of *Yates v. Milwaukee* is clearly held in the *Eisenbach* case not to apply to rights of abutters on tidal waters in the State of Washington, being contrary to the Constitution of the State.

The other case relied upon by respondents below on this point was *Aborn v. Smith*, 12 R. I. 373, which was also a controversy between private owners and not between an owner and the State. That case, also, was based upon the fact of the State having established a harbor line, which is not the situation in the case at bar.

Not only so, but notwithstanding the holding in the Rhode Island cases that the establishment of a harbor line taken together with the legislation in Rhode Island confers upon abutting owners the right to fill out to the channel across the State tide lands, it is held in that State that the right so to do is merely a license and that if the State sees fit to

erect structures thereon the abutting owner has no right to compensation.

> Gerhard v. Seekonk River Bridge Commissioners, 5 Atl. Rep. (R. I.), 199.

And the Supreme Court of Washington has held that the establishment of pier-head lines in front of harbor area leased by the State confers no rights in the lessee in the strip between the harbor area and the pier-head line.

> Wilson v. Oregon-Washington R. & Nav. Co., 71 Wash., 102, 107.

(In examining the above case it is desirable to note that the syllabus by inadvertence suggests the establishment of pier-head lines by the State. There is nothing of that kind in the case itself, the question being as to the effect of the establishment of outer and inner harbor lines creating a harbor area which did not reach out to the Government pier-head line.)

The Supreme Court of Washington has also held that there is no provision in the legislation of this State for establishing pier-head lines and that no rights are fixed by the appearance of a pier-head line upon a State tide land plat. The Court says:

"The use of the words 'pier-head line' on the plat prepared by the State and in the decree is an unfortunate misuse of terms. The words mean nothing under our Constitution and statutes."

Puget Mill Co. v. State, 93 Wash., 128, 141.

II.

THE SALE BY THE STATE OF WASHINGTON TO RESPONDENTS' GRANTORS CARRIED WITH IT NO RIGHT OF ACCESS TO OR WHARFAGE IN EAST WATERWAY.

The question of the pier-head line being disposed of, the case before the Court is one in which the State of Washington has platted a public waterway and has platted its tide lands abutting upon the waterway into lots and sold them to the respondent railroad company's grantors with nothing in either grant or plat indicating any intention to confer upon its grantee any right in the waterway of any kind. If respondent railroad company has in fact any right either of access across the waterway area or of wharfage therein it is a right implied from the grant and nowhere indicated in terms.

For the determination of the effect of the grant in question we must look to the statutes and Court decisions of the State of Washington.

The shore of navigable waters, and the tide lands thereunder, are owned by the State in which they lie as a part of its sovereignty, and all rights therein claimed under State grants are to be determined by the local law of the State in which the lands are situated, and the decisions of the Courts of such State in the construction of such grants and the law applicable thereto, are binding upon the Federal Courts.

Hardin v. Jordan, 140 U. S., 371, 11 Sup. Ct. Rep. 808.

Shively v. Bowlby, 152 U. S., 1, 13, 14 Sup. Ct. Rep. 548.

St. Anthony Falls Water Power Co. v. Board of Water Com., 168 U. S., 349, 18 Sup. Ct. Rep. 157.

United States v. Mission Rock Co., 189 U. S., 391, 23 Sup. Ct. Rep. 606.

Weber v. Harbor Com'rs, 18 Wall. 57.

There are many other cases decided by this Court to the same effect, but as they are cited and reviewed in the above cases, and as this position was not contested below, and will probably not be contested here, we will not burden the brief with further citations to this point.

An examination of the legislation of the State

of Washington pertaining to the question at issue and which has been set forth in this brief discloses no intimation or suggestion of any riparian right being included or implied from the State's grant.

And the Supreme Court of the State of Washington in accordance with the general trend of judicial authority has held that State grants are to be strictly construed.

> "Every grant by a sovereign State is construed most strongly against the grantee. Nothing passes by intendment or implication. And if the law or the State deed fixes no limit to a grant it becomes the duty of the Court to fix the narrowest limit that will reasonably satisfy the terms of the grant."
>
> Pearl Oyster Co. v. Hueston, 57 Wash., 533, 538.

There are no decisions of the Supreme Court of the State of Washington as to the construction of a State grant of tide lands abutting upon an artificial State waterway. But East Waterway is in fact but a deepened arm of the sea. Its site has always been covered by the ebb and flow of the tide, as were also the abutting tide lands now owned by the respondent railroad company and which were conveyed to its grantors by the State.

We submit that there is no reason to believe that the State in conveying its lands bordering upon such an artificial waterway intended to convey any greater rights than a similar grant of upland bordering upon a natural waterway would have conveyed. Certainly if the State had intended that its grantee of tide land (constructed into artificial upland by filling) was to have greater rights in the public navigable waters of the State upon which his land abuts than the owner of natural uplands abutting upon a natural navigable waterway there would have been something in the statute or in the State grant indicating such an intention.

The Constitution of the State of Washington contains the following provision:

> "The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State."

Constitution of Washington, Article XVII, Sec. 1.

1 Remington & Ballinger's Code, p. 114.

The construction and enforcement of this Constitutional provision as relating to tide lands and riparian rights of owners of lands abutting upon tide waters engaged the attention of the Supreme Court of Washington very soon after the adoption of the Constitution and in the case of *Eisenbach* v. *Hatfield,* 2 Wash., 236, the subject received exhaustive consideration. In that case the Court said:

> "We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights as against the State or its grantees to extend wharves in front of his land below high water mark." (See p. 249.)

Again at page 253 the Court says:

> "The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the State have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the State to deal with its own property as it may deem best for the public good. If the State cannot exercise its Constitutional right to erect wharves and other structures upon its public waters in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self-development, which every government is supposed to possess—a proposition to which we cannot assent. See Galveston v. Menard, 23 Tex. 349. Nor do we think this view in any way conflicts with the constitution of the State, but, on the contrary, we believe it

> is in strict harmony with it, when all its parts are construed together. We cannot think that the building by the State or its grantees of wharves upon shores of navigable waters would constitute either a taking or damaging of private property for public use, in contemplation of the constitution. See *Com. v. Alger, supra.*"

The doctrine of the case of *Eisenbach* v. *Hatfield* has been followed without substantial qualification ever since it was rendered, the Courts continually reverting to it and reaffirming its doctrines as the law of the State.

> *Harbor Line Commissioners v. State,* 2 Wash. 530.
>
> *Lownsdale v. Grays Harbor Boom Co.,* 54 Wash. 542.
>
> *Newell v. Loeb,* 77 Wash. 182.
>
> *Hill v. Newell,* 86 Wash. 227.

The case of *Newell* v. *Loeb* cited above was a case in which damages were sought by the owners of lands abutting upon the Duwamish River for diversion of the stream by the State so that the abutting lands instead of running to the navigable waters of the river would be a half-mile from the river. It was held that the diversion of the stream and the taking away of access to the waterway occasioned no legal damages to the abutting owners, the State owning the bed of the stream and being en-

titled to do what it would with its own. Duwamish River is the stream coming into Seattle Tidelands from the South, and East Waterway was so platted as to carry part of its waters as required by Section 3 of the Waterway Act, and the Ox Bow Bend which was cut off in the improvement of the river and which was involved in the case of Newell v. Loeb, was some two or three miles up-stream from the site of the present controversy. See Plaintiff's Exhibits 4 and 5 and testimony of Blackwell, Record, pp. 43, 44, 45.

In deciding the case of Newell v. Loeb the Court said:

> "The appellants Loeb and Moyses requested the Court to give an instrution to the effect that persons owning property upon a navigable stream have the right to the use of that stream for the purposes of approach, the construction of wharves, docks, and for all the usual purposes of navigation; and that, if the jury should find that either of such purposes would be lost as to Loeb and Moyses by reason of the improvement contemplated, the jury might consider such fact in determining the amount of damages. The Court refused this instruction, but gave an instretion to the effect that the jury should not take into consideration the fact that the main channel of the Duwamish River might be diverted by reason of the improvement, and that the State or its subsidiary corporation, the

waterway district, might claim the bed of the river as a diverted stream.

The waterway district was not seeking to take any of the property of these appellants. But it is claimed by them that, because the channel of the Duwamish River was changed at the Ox Bow bend so as to leave the property of these appellants one-half mile from the new channel, this was damaging of their property on account of which they are entitled to be compensated. It is conceded in the case that the Duwamish River is a navigable river. These instructions raised the question, which is presented here by the appellants, whether the State takes title to the bed of navigable rivers or whether, when the bed of the river is changed or reclaimed, the title to the bed belongs to the adjoining owners.

There are many conflicting opinions upon this question. But we think it is set at rest in this State by many decisions heretofore rendered. The Constitution of this State, at Sec. 1, of Article 17, declares that the State asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all rivers and lakes. In Shively v. Bowlby, 152 U. S. 1, it is said:

> 'The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or grant-

ing rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another.'

In *Grays Harbor Boom Co. v. Lowusda'e*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267, this court said:

'Legislation has proceeded upon one of two theories with reference to tide and shore lands. The one, that the State will recognize a riparian right in the upland owner and compel the public to subordinate its rights (except as to navigation) to his convenience. The other is that the title to all tide and shore lands is in the State, and may be sold, leased, or otherwise disposed of in aid of business and commerce, and without reference to the comfort and convenience of the upland owner. This State has asserted the latter doctrine. It will thus be seen that the case involves primarily the question of State policy. The State has a right to deal with its own property as its own. There is, therefore, no Federal question involved.'

See also *Bilger v. State*, 63 Wash. 457, 116 Pac. 19; *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59; *State ex rel Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945. In the case last cited, after reviewing the question as to the right of an upland owner to take water from a navigable lake, we said:

'No decision of this court has come to our notice dealing directly with a claim of water for irrigation made by an upland owner

by reason of such land bordering upon navigable water; but it seems to us that our constitutional declaration of ownership, and former decisions touching the effect of that declaration, are clearly opposed to the contention that an upland owner can make lawful claim to the use of navigable water upon which his land borders, and rest such claim solely upon the ground that he has a common law right in such water by reason of his land bordering thereon, as against the State or one who appropriates such water in pursuance to the laws of the State.'

And in *Commissioners Commercial Waterway District No. 2, etc., v. Seattle Factory Sites Co., supra,* at page 194, we said:

'It may be conceded that a description in a conveyance which bounds the land conveyed by a stream, if unnavigable, will be construed as meaning the thread of the stream, but where the description is specific in its language, naming the bank of the stream as the boundary of the land conveyed, we think the decided weight of authority is to the effect that the grantee's rights will not extend beyond such specified boundary so as to give him any right in the bed of the stream. (Citing authorities.) We understand it to be conceded in the briefs of counsel that Cedar river is unnavigable and that Black river is navigable. As to the latter, it is plain that the title to the bed thereof is not in appellant, but is in the State. Section 1, article 17, State constitution.'

From these, and numerous other authorities which might be cited, it is plain that the State is the owner of the bed of the Duwamish river,

being a navigable river, and that the appellants Loeb and Moyses have no interest therein. And the fact, if it is a fact, that their land borders upon the shore of the river does not give them any rights, either in the bed of the stream or in the waters thereof."

Newell v. Loeb, 77 Wash., 182, at pp. 191, 192, 193, 194.

In Judge Neterer's opinion rendered in this case language is quoted (see Record, p. 36) from the case of *Illinois Central Ry. Co. v. Illinois*, 146 U. S., 387, to the effect that the title of the State to tide lands under navigable waters is one held in trust for the people of the State, "that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants." (Record, p. 36.)

We suppose that it was upon this theory that in the opinion the Court found that the giving of a

permit by appellant and the making of a lease by respondent railroad company to respondent J. F. Duthie & Company for shipyard purposes was not authorized by the statute, though the decree as finally entered seems to have ignored this position.

We submit that for the purposes of this case it is wholly immaterial whether the title of the State of Washington to the waterway area in the East Waterway is held to be by *jus publicum* or by *jus privatum*. This suit is one to quiet the title of the State and its representative, appellant, in the waterway area as against the claims of respondent railroad company that it has a right in the waterway area for access and for the construction of wharves or other structures, and if the State in fact owns the waterway area either by virtue of its sovereignty in trust or by full beneficial title, appellant should in either case, having full jurisdiction of the waterway under the laws of the State of Washington with power to give permits for its use for proper purposes, be held to have the right to maintain this suit to quiet the State's title as against the claims of respondent railroad company. Whether the Port has made an improper use of its trust powers and given an improper permit is in no manner material to the

determination of this cause. If the State's title is in trust for the whole people of the State it is in trust for the protection of the rights of navigation and fishery and not in trust for any private person, whether he be an abutting owner or another,—the trust is for the protection of public rather than private rights.

However, in the case of *Harbor Line Commissioners v. State*, 2 Wash. 530, our Supreme Court said (at page 534):

> "Acting within their sovereign power, as above recognized, the people of this State, in forming a constitution, saw fit to assert the title of the State to the lands in question, and having done so they are the only power that can interfere with such title. But it is said that, while such assertion of title is made in the constitution, it is so made subject to vested rights of the riparian owner to be asserted in the courts. I am of the opinion that this vested right cannot be held to be such as is incident to the riparian owner simply as such, but must be held to apply only to some special right held by such owner by way of improvements made under express or implied license from the representative of the sovereign power. To hold that the former was intended, would practically destroy the title of the State, and would, therefore, be inconsistent with the assertion of such title; while the latter construction will give force to every word, and make the provision in its entirety a consistent one. *When the people say that they assert the State's title, it must be held to mean*

the entire and exclusive title. Of course, the rights of the State, as above stated, are subject to the paramount right of the United States to regulate commerce and navigation, as to which I shall say a word later on."

(The *italics* are ours.)

And in the case of *Eisenback v. Hatfield*, 2 Wash. 236, 240, the Court says:

> "In this State the common law is our rule of decision in the settlement of questions requiring judicial determination, when not specially provided for by statute. And it seems to be generally conceded that at common law the title to the soil under tide water was vested in the crown. The ownership of the soil was regarded as a *jus privatum*, and could be conveyed to individuals, subject only to the public right of navigation and fishing, which public right was under the absolute control of parliament. In this country we have the highest authority in support of the doctrine that the State has succeeded to all the rights of both king and parliament, and hence is the absolute owner of all the navigable waters and the soil under them within its territorial limits."

The trial Court held that no harbor area had been created in the East Waterway and we are not contesting that position upon this appeal. However, at the time this waterway was created and these tide lands platted and sold to respondents' grantors and at all times since the power of the State to plat harbor lines and areas in the waterway has existed as

will be seen by reference to Section 1 of Article XV of the Constitution hereinbefore quoted. This provision has been held to require the establishment of harbor lines in all harbors.

> *State ex rel Seattle v. Savidge*, 95 Wash. 240, 245, 246.

See also *Puget Mill Co. v. State*, 93 Wash. 128.

And the Supreme Court in the leading case, to which we have referred so many times, *Eisenbach v. Hatfield*, 2 Wash. 236, at page 249, in discussing a case involving tide lands in which no harbor line had been then laid out (and in that respect like the case at bar), says:

> "We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights as against the State or its grantees to extend wharves in front of his land below high water mark.
>
> But, if this were not so, we would still be constrained to hold that appellee has no such rights; for the constitution of the State, which is the supreme law of the land, expressly declares that the legislature shall provide for the appointment of a commission, whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors of the State, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof, upon either side; and, further, that the legislature shall provide gen-

> eral laws for the leasing of the right to build wharves, docks and other structures, upon certain designated areas, or the legislature may provide by general laws for the building and maintaining, upon such area, wharves, docks and other structures. (Const., Art. 15.)"

And it will not be and cannot be contended but that if the State authorities should have heretofore or should in the future determine to lay out harbor lines and plat harbor area within the boundaries of the East Waterway, respondent railroad company would have no access and no right of access to navigable water in the East Waterway.

We submit that this power in the State (and indeed the Constitution seems to make it a duty rather than a power) to lay out harbor areas in the waterway is a very strong argument to indicate that it was not intended that grantees of lands abutting upon the waterway should have as an incident to their ownership any rights in the waterway.

III.

SHORE LAND CASES.

Respondents upon the hearing below relied particularly upon the doctrine laid down by our Supreme Court in certain shore land cases, being the cases of *State v. Sturtevant*, 76 Wash. 158. *Van*

Siclen v. Muir, 46 Wash. 38, and *Muir v. Johnson,* 49 Wash. 66, and Judge Neterer in his decision in this case finding certain rights to exist in the waterway in favor of the respondent railroad company, seemed to base his decision upon the *Sturtevant* case.

We most respectfully submit that those cases are not applicable to and have no bearing upon the question involved in this case.

Those cases involved rights of purchasers from the State of shore lands upon fresh water not affected by the ebb and flow of the tide. Shore lands were sold by the State not in lots or platted tracts, but by lineal front chain without the specification of an outer boundary.

The case of *State v. Sturtevant* arose out of a contest between the State and certain purchasers of shore lands upon Lake Washington. In connection with the construction of the Government Canal between the tide waters of Puget Sound and Lake Washington, which is a body of fresh water, the level of the waters of Lake Washington was lowered many feet, thereby increasing the width of shore land upon the borders of the lake. The case of *State v. Sturtevant* was brought by the State to determine

the right, as between the State and owners of shore lands who had purchased them prior to the lowering of the lake, to the strip of shore land so exposed by such lowering. It was held in that case that the purchasers of shore lands, having purchased them without an outer boundary, took to the line of navigability, and, basing its dictum upon the case of *Miller v. Mendenhall*, 43 Minn. 95, said (though the point was not involved in the case) that "The right of a riparian proprietor or a shore owner to improve up to the line of navigation and to erect docks and piers, though sometimes denied, is now well settled." It must be remembered, however, that the case of *Miller v. Mendenhall* involved rights upon a navigable fresh water river and that the Court in deciding the case was passing upon rights of a purchaser of shore lands without an outer boundary and upon fresh water and not upon any question involved relating to tide lands or lands bordering upon tide waters.

The Court reaffirmed the doctrine of *Eisenbach v. Hatfield* and quoted the language of that opinion that "the owner of uplands bordering on navigable waters as such had no riparian or littoral rights in such waters as would enable him to maintain an in-

junction from interference therewith." (See p. 164.) The Court also called attention to the fact that "The law provides that shore lands of the second class shall be sold not by tracts or lots and blocks, but by the lineal chain." (See p. 165.)

The Court also says, on page 163:

> "This Court has, with the exception of the case of *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, uniformly held that there is no riparian right in the owner of lands bordering on the navigable waters of the State,"

supporting the statement by the citation of a long line of decisions of our State Supreme Court.

The Court, on the same page, page 163 of the decision, after quoting the constitutional provision, says:

> "This declaration destroyed all riparian right in tide and shore lands, and affirmed the right of the State to absolutely control and dispose of these lands in any way or to whomsoever the legislature might ordain."

On page 172 of the opinion the Court says:

> "The Attorney General relies upon the case of *Pearl Oyster Co. v. Hueston*, 51 Wash. 533, 107 Pac. 349, 832, 135 Am. St. 1007, as decisive of this case and of the proposition that the title of shore lands will not be extended beyond mean low water. Respondents insist that that case is a mispronouncement of the law. We cannot

agree with either side. The confusion of counsel comes from the failure to mark a difference in definition. Tide lands are defined as "all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, except etc.;" whereas, shore lands are "lands . . . . below the line of ordinary high water and not subject to tidal flow." Rem. & Bal. Code, Sec. 6641, paragraphs 2 and 3. The words "mean low tide" must have been used advisedly. When the legislature thus limited the outer boundary of tide lands and made no attempt to limit the water boundary of shore lands, it follows, under primary rules of construction, that the purchaser of shore lands of the second class takes the littoral and riparian right in and appurtenant to his land under the general rules of law as construed by the courts and accepted by the people for hundreds of years. 'The riparian owner is . . . . entitled to have his contact with the water remain intact. This is what is known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream. *Farnham*, Waters and Water Rights, Sec. 62.' A possible reason for limiting the definition of tide lands to the line of mean low tide—indeed, it is most probable—was to protect the State's ownership of oyster lands, for it is well known that oyster land is generally to be found below the line of mean low tide."

We call very special attention to the fact that the Court in the quotation above recognized the difference in the policy of the State in the sale of its tide lands and its shore lands, and while this decision

in its reasoning (though not upon the facts involved, for riparian or wharfage rights were not involved but only the title to a strip of shore land uncovered by the lowering of the lake) sustains a claim to riparian rights in favor of an owner of shore lands abutting upon fresh water purchased without an outer boundary line, it does not in any manner sustain the claim to such riparian rights as appurtenant to tide land, but denies their existence, the doctrine of *Eisenbach v. Hatfield* remaining in full force as to such lands and being approved in the *Sturtevant* case.

The *Sturtevant* case involved nothing but the question of the outer boundary of shore lands bought from the State. The question involved was not one of riparian rights appurtenant to land held in ownership, but the outer boundary of the ownership. There is no question in the case at bar as to the outer boundary of respondent railroad company's title. Respondent will not contend that it has title beyond the line of the waterway, which was the outer boundary of the lots which it bought from the State. Respondent is claiming that it has appurtenant to this land held in private ownership certain riparian rights extending beyond its outer boundary. In the *Sturtevant* case the sole question was as to where

the outer boundary of the private title was located.

The case of *Van Siclen v. Muir,* 46 Wash. 38, and *Muir v. Johnson,* 49 Wash. 66, were cases involving the rights of shore owners on Lake Washington prior to the purchase of the shore lands and denying riparian rights to them. It is true that in the case of *Muir v. Johnson* the Court, while holding that the plaintiff was not entitled to any relief and had no riparian rights as owner of the upland, intimated that riparian rights on Lake Washington were appurtenant to the shore lands which belonged to the State, the Court referring to the case of *Eisenbach v. Hatfield.* That question, however, was foreign to the case. No case can be found in the decisions of Washington courts sustaining riparian rights as incident either to upland or to granted shore or tide lands.

And when it is remembered that the State of Washington by its Constitution declares its ownership of the beds and shores of all navigable waters, that the property claimed by respondent railroad company is a certain portion of such State owned tide lands, definitely described in the grant, and that the bed and shore of East Waterway are another portion, it seems impossible that the State intended

by the grant to respondents' grantors to convey anything in the bed and shores of the waterway which under the decisions of the State were absolutely owned by the State.

In the decision of this case it should be remembered that the Constitution, statutes and Court decisions of the State of Washington all proceed upon the theory of the absolute ownership of the tide lands by the State, and there is no case decided sustaining any riparian or wharfage rights or rights of access in the owner of land bordering upon tide water. If such rights should be sustained in this case in favor of the respondent railroad company, it would be the laying down of a new doctrine in favor of tide land owners. Loose expressions of State judges in deciding questions wholly relating to rights of shore land owners who purchased without a boundary upon the water side should not be taken as indicating an intention by the State of Washington in the sale of its tide lands to grant riparian or wharfage rights, especially in view of the fact that even in those shore land cases the Court has called attention to the distinction between grants of lands bordering upon tide water and lands bordering upon the shores of fresh waters, and the differ-

ence between the policy of the State in dealing with them respectively.

It is also to be noted, by reference to the statutes hereinbefore quoted with reference to waterways and their improvement, that at the time of purchase by the respondent railroad company the waterway was not a waterway in fact, it never having been excavated, and when it should be excavated, and to what width and depth was left wholly to the discretion of the State officers; that to the City of Seattle first and afterwards to the Port was committed, as indicated elsewhere in this brief, full power of changing the channel or course of the waterway and regulating and controlling its use and the construction and maintenance of wharves and structures therein, and that there is not a syllable in any State statute which intimates or suggests any riparian or wharfage rights as having been intended to be conferred in tide waters by the fact that the State sold lots abutting thereon by specific boundaries.

IV.

DECLARATION IN WATERWAY ACT THAT THE WATERWAY SHOULD BE FOREVER RESERVED FROM SALE OR LEASE.

Upon the trial below respondent railroad company relied strongly upon the language in the Waterway Act, that waterways created thereunder should be forever reserved from sale or lease as public ways for water crafts. We submit that the declaration is of no force as affecting the grant by the State to respondents' predecessors in title.

In the first place, if the language is to be construed as applying to the whole width of the waterway, it must be held invalid as attempting to prevent the laying out of harbor lines and areas in the waterway as required by Section 1 of Article XV of the Constitution hereinbefore quoted and as contrary to Section 2 of Article XV of the Constitution providing that:

> "The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in section one of this article." * * * *
>
> 1 Remington & Ballinger's Code, p. 111.

The Waterway Act, we submit, therefore, must be construed simply as creating a waterway which formed a connecting link in or part of the other tidal navigable waters of the State. It being a part of the harbor of a city of the first class, it was subject to control, modification and change at the instance of the State in the interests of the public, the same as all of its other navigable waters, and it has been so treated by the State at all times. The Legislature of the State of Washington at the same session when the original Waterway Act was passed conferred upon the City of Seattle, as a city of the first class, the power:

> "To deepen, widen, dock, cover, wall, alter or change the channels of waterways and courses, and to provide for the construction and maintenance of all such works as may be required for the accommodation of commerce, including canals, slips, public landing places, wharves, docks, and levees, and to control and regulate the use thereof."
>
> Laws of 1889-1890, pp. 221 and 222, subdivision twenty-sixth.

And these powers were thereafter, as has been heretofore shown, transferred in 1911 to the appellant, Port of Seattle.

It would be strange indeed if the State should

be held by the language of the Waterway Act to have abdicated in favor of its grantees of abutting tide lands its right to deal with its public waterway as in the interests of the public for the purposes of navigation and commerce it may from time to time deem best.

If the abutting owners on the waterway have a permanent vested right to access across the waterway area and do not themselves construct wharves to act as the fingers of commerce the purposes and the usefulness of the waterway would be largely destroyed. If the position contended for by respondent and sustained by the trial Court below should be affirmed here the result would be that while as to all natural tide water streams, like the Duwamish river, the State can without compensation to abutting owners fill up the stream and remove the navigable water a half-mile from the property of the abutters (as was decided in the case of *Newell v. Loeb and Hill v. Newell* above cited) it has no power to deal in like manner, or at all, with the East Waterway simply because it is an artificial rather than a natural waterway. We submit that the declaration in the Waterway Act that the waterway should be a public way for water crafts was inserted for the pre-

servation of the waterway for purposes of navigation and was not intended to confer private rights in any private owner of lands. We submit, further, that the Constitutional provision requiring the location of harbor lines and areas within the waterway is itself conclusive evidence that no riparian rights were intended to be created in abutting owners, as such rights even if created would be forthwith destroyed whenever the Legislature carries out the Constitutional requirement for the establishment of harbor areas and the leasing of the same for the construction of wharves.

The fact is that the Legislature at its session in 1890 had under consideration two plans, one for the Establishment of Waterways through State tidelands, and the other the platting and sale of the tidelands not included in waterways. It passed the two acts of that year we have printed in this brief. In one it provided for the platting and sale of the tidelands, and in the other the platting by a different State agency of the waterway, and to make it clear that the act for platting and sale of the tidelands did not include the tidelands in the waterway those lands were expressly reserved from sale and lease. But the declaration of the State's policy as to the

bed of the State's waterway neither conferred an interest therein in purchasers of tidelands, nor lessened the power of the Legislature to change the State's policy as to the waterway in the interest of the public by providing for making the waterway useful by the construction of wharves and aids to commerce and navigation and the passage of regulatory measures like chapter 168 of the Laws of 1913.

V.

Respondent railroad company is here claiming that it has certain riparian rights and that those rights are not created by any express legislation or express grant. If such rights exist they are implied rather than expressly granted. We have seen that the rule is against such an implication in State grants. We call attention also to the fact that in this State, as quite generally, the right to wharf out where conferred by statute is until exercised a mere revocable license and creates no vested right.

Eisenbach v. Hatfield, 2 Wash. 236, 250.

Shively v. Bowlby, 152 U. S. 1, 13, 14 Sup. Ct. Rep. 548.

CONCLUSION.

We most respectfully submit:

1. That the decree of the trial Court should be reversed and the case remanded to the State Court.

2. If our prayer to have the case remanded to the State Court is not granted, then that the decree of the trial Court be reversed and that Court directed to enter a decree quieting the title of the State of Washington and the appellant, as its representative, to the waterway area described in the complaint as against the respondents, and that respondents be decreed to have no interest therein, and that Chapter 168 of the Laws of Washington of 1913 is a valid exercise of the sovereign power of the State of Washington.

HAROLD PRESTON,
O. B. THORGRIMSON,
LEANDER T. TURNER,
Attorneys for Appellant.
PRESTON, THORGRIMSON & TURNER,
Of Counsel.

FREE COPY

NOV 15

JAMES D. MAHE

Supreme Court

Case No. 107

In the Supreme Court of the United States

PORT OF SEATTLE,
Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY AND J. F. DUTHIE & COMPANY,
Respondents.

Case No. 107

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

HAROLD PRESTON,
O. B. THORGRIMSON,
LEANDER T. TURNER,
Attorneys for Appellant.

PRESTON, THORGRIMSON & TURNER,
Of Counsel.

911 Lowman Building,
Seattle, Washington.

INDEX

Burden of Proof 26
Estoppel Not Applicable 30
Littoral Rights not Recognized by Tideland Act.... 34
Motion to Remand 5
Pierhead Line 18
Allegation of Complaint as to 19
Plats of 22
Street Rule not Controlling 31
Tide and Shore Lands Distinguished 36

CASES

Ayers, In re, 123 U. S. 443..... 8
Childress Land & Cattle Co. vs. Baker, 50 Pac. Rep. 756 30
Ferguson vs. Ross, 38 Fed. Rep. 161..... 7
Fitts vs. McGhee, 172 U. S. 516 8
Hopkins vs. Clemson Agr. College, 221 U. S. 636.... 12
Illinois Central Ry. Co. vs. Adams, 180 U. S. 410....5, 6
Interstate Construction Co. vs. Regents, 199 Fed. Rep. 509..... 11
Lee Wilson & Co. vs. U. S., 245 U. S. 24..... 30

M. K. & T. R. Co. vs. Hickman, 183 U. S. 53..... 7
Mullen vs. State, 46 Pac. Rep. 670..... 30
Newell vs. Loeb, 77 Wash. 182..... 32
Paul vs. Seattle, 40 Wash. 294..... 30
Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362 12
Shively vs. Bowlby, 152 U. S. 1..... 33
Scully vs. Bird, 209 U. S. 481.....5, 6
State vs. Superior Court, 91 Wash. 454, 459..... 30
Western Union Tel. Co. vs. Andrews, 154 Fed. Rep. 95 8

MOTION TO REMAND.

The first point made by respondents upon the point involving the Motion to Remand is that the question is one involving the merits of the case rather than jurisdiction, counsel for respondents citing cases of *Illinois Central Ry. Co. vs. Adams*, 180 U. S. 410 and *Scully vs. Bird*, 209 U. S. 481.

Neither of these cases were brought in the State Court, nor was the question of the right of removal involved. The case at bar was brought in the State Court and it was necessary for the respondents in seeking the removal of the case to make it affirmatively appear that there was diversity of citizenship and in the absence of its being made so affirmatively to appear, respondents were not entitled to the removal, and the removal having been granted, the case upon motion should have been remanded.

The bill showed upon its face (as appears from the discussion in appellant's original brief and in the discussion hereinafter in this brief) that the case was brought by the appellant as *representative of the State of Washington*. It therefore appeared upon the face of the record in the State Court at the time the petition was presented and heard

that it was a suit brought by a representative of the State to assert the State's rights. No case will be found which supports the right of removal in such a case.

The case of *Illinois Central Ry. Co. vs. Adams*, 180 U. S. 410 above referred to was a case brought against state officers to enjoin the enforcement of a tax claimed to be unlawful, and it being contended by the defendant that the suit was against the State the court held the contrary, saying, "but where the suit is against an individual by name and he desires to plead an exemption by reason of his representative character he does not raise the question of jurisdiction in its proper sense."

The case of *Scully vs. Bird*, 209 U. S. 481, above referred to, was an action to enjoin unlawful and malicious prosecution by a dairy and food commissioner, the action being alleged to be done under cover of office but in violation of State laws, and the court in that case, which was brought in the Federal Court, held that the defendant if he desired to take advantage of the defense that he was acting in a representative character, must do it by pleading and that the question of jurisdiction was not technically involved.

The only case cited by respondents in which the suit was brought in a State Court was the case of *M. K. & T. R. Co. vs. Hickman,* 183 U. S. 53, which was cited in appellant's original brief and discussed at length on pages 46 and 47. It was held in that case that the State was not the real party, upon the ground that the State had no interest in the determination of the suit, the suit being brought by a Railroad Commission against a Railroad Company with respect to the subject of rates, in which only the railroad on the one side and the general public on the other were interested, the State having in fact itself no interest. But the court in that case did approve the rule laid in *Ferguson vs. Ross,* 38 Fed. Rep. 161, 3 L. R. A. 322, cited in appellant's brief, being another case brought by a state officer in the name of the officer, in which the moneys to be recovered were payable into the State Treasury. It was held in that case that the State was the real party and that it therefore could not be removed from the State to the Federal Court.

The case at bar is also to be distinguished from all the cases cited by respondents in that it is not a case in which the respondent has brought the action as against appellant and is claiming threatened un-

lawful action by appellant either under cover of alleged State authority or otherwise. There was no such threatened action. The suit was brought by appellant as the State's representative to have the rights of the State determined by the State Court. It has been repeatedly held by this court that where the action threatened is to take orderly procedure through the medium of the court, the action cannot be enjoined as against a representative of the State, even though it be claimed that the law under which the action is brought is alleged to be unconstitutional and void. See

Fitts vs. McGhee, 172 U. S. 516; 19 Sup. Ct. Rep. 269;

In Re Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164.

"A proceeding against officers of a State merely to test the constitutionality of a state statute in the enforcement of which the officers will act only by formal judicial proceedings in the courts of the state, as attorneys for the State, is in effect a suit against the State."

Western Union Telegraph Co. vs. Andrews, 154 Fed. Rep. 95, 107.

This case contains an exhaustive review of the authorities.

Counsel for respondents also refer to the judgment of the lower court, saying that it "imposes no liability upon the State, requires no affirmative action by its officers, deprives it of no property it now possesses and takes from it no revenue it ever enjoyed."

Of course the judgment entered has no bearing upon the question of the right of removal. The right of removal depended entirely upon the record in the State Court as shown by the petition for removal and the bill of complaint. If these did not show a right of removal, appellant is entitled to have the case remanded. However, we cannot agree with counsel as to the effect of the judgment. The Port is authorized under State law to lease the waterway area involved on behalf of the State for rental to be paid into the State Treasury, and if the decree of the lower court stands, the State will be deprived of its rental and the appellant as its representative cannot perform the function vested in it by the State for the State's interest, the lower court having in effect decreed that the title of the State is subject to an easement in favor of respondent.

The second point made by respondent in discussion of the Motion to Remand is that the appellant having been given the power to sue and be sued in its own corporate name, thereby the State consented to be sued through its representative.

Appellant is a municipal corporation having the power to own and actually owning docks, warehouses and terminal facilities and conducting a warehousing and terminal business. We do not of course contend that if the Port sues to collect wharfage or any other charge which it is authorized to collect for its own benefit as a municipality, or if it brings any suit with relation to its property which it holds as a municipal corporation for its own benefit or that if any suit is brought against it on any contract or liability incurred by it, or with respect to any of the property which it holds as a corporate entity, that in such suit the Port represents the State or that such a suit could not under proper diversity of citizenship in the opposite party be removed to the Federal Court.

But we do claim that where, as in this case, the State law in providing for the giving of permits on behalf of the State for the use of the State waterway areas authorizes the State Land Commissioner to

make leases where the waterway is outside of the Port District and vests the same function in the Port as the State's representative where the waterway is in the Port District and requires that in both cases the rent shall be paid to the State, that the Port is just as much a representative of the State as the State Land Commissioner would be and that if a suit is brought by either expressly upon the face of the bill as a representative of the State and for the purpose of quieting the State's title as against the adverse claim of anyone disputing the power of the State to control such waterway area, that the suit is in effect one by the State and not by the official or State agency appearing as the nominal party plaintiff.

The cases cited by respondent in support of its contention on this point are not in our opinion adverse to our position. The case of *Interstate Construction Company vs. Regents*, 199 Fed. Rep. 509, was a suit brought against the Regents of the University of Idaho on a contract made by the Regents for the construction of buildings by the plaintiff as contractor. The Regents of the University was a municipal corporation and as such made the contract for the construction of the buildings for their

corporate purpose. The case of *Hopkins vs. Clemson Agricultural College,* 221 U. S. 636, was one in which the court held that the Clemson Agricultural College of Southern California could not avail itself of the State's constitutional immunity from suit where the corporation was sued for its construction, under State authority but for its own corporate purposes and advantage, of a dike upon land owned by the State but in the use, possession and enjoyment of the college, it being contended in the suit that the construction damaged the property, without due process of law, the court holding that the dike was for the college's own proprietary and corporate purposes.

The other case cited in support of this point is that of *Reagan vs. Farmers Loan & Trust Company,* 154 U. S. 362-391. That is a case brought to enjoin the enforcement of alleged invalid regulations made by a Public Service Commission and is, of course, easily distinguished upon two grounds, first, that it is a suit brought against rather than in favor of a State representative and to enjoin invalid threatened action rather than to establish the State's rights by decree of court in advance of action, and in the second place that it involved questions which

were only of interest to the public on one side and the plaintiff on the other, the State having itself no interest.

The third point made by respondent upon the motion to remand is that appellant in this case is in reality asserting its own claim of ownership and right to use exclusively the waterway area for its own corporate purposes and for the revenue it may derive therefrom and that the State has at most only a remote, indirect and contingent interest in the results of suit.

Counsel for respondent seek to justify this position by an argument based upon the terms of the bill of complaint in this case and the Washington statutes relating to the waterway area and the Port of Seattle. We think a careful consideration of both the bill and the law supports appellant's rather than respondents' position.

Referring first to the complaint (Record, pp. 1 to 3) it alleges that plaintiff is a municipal corporation (Par. 1), that the defendants, Oregon-Washington Railroad Company and J. F. Duthie & Co. are each corporations (Par. 2) and that the respondent O. & W. R. Co. had delivered a certain lease annexed to complaint, marked "Exhibit A" to

the respondent J. F. Duthie & Co. (Par. 3); the ownership by respondent O. & W. R. Co. of certain upland abutting on the East Waterway, the establishment of a Pierhead Line, that the "waterway area between the said shore line and the said Pier Head Line as the same abutts upon the premises herein described is within the jurisdiction of the plaintiff *acting for and on behalf of the State of Washington;*" that in the lease marked "Exhibit A" the respondent O. & W. R. Co. purports to claim and does claim jurisdiction over said waterway area; that it had no right or interest therein and had made no application to appellant for a permit for the use of it and none had been granted to it and that its claim was wholly unfounded (Par. 4); That appellant had granted a waterway area permit to respondent J. F. Duthie & Company of which copy is annexed, marked "Exhibit B" (Par. 5); that in the lease marked "Exhibit A" the rental reserved to respondent O. & W. R. Co. from respondent Duthie & Company included rental for the waterway area (Par. 6).

By reference to "Exhibit B" it will appear that the Port gave the permit to respondent Duthie & Co. expressly under the terms of Chapter 168, the

title of the Act being therein quoted (Record p. 9).

The complaint concluded with a prayer asking for an injunction against the respondent O. & W. R. Co. from claiming or exercising any jurisdiction over the waterway area and seeking a reformation of the lease between the two respondents by striking therefrom the provisions therein by which the respondent O. & W. R. Co. claims jurisdiction over the waterway area and attempts to grant any rights therein to the respondent Duthie & Company and directing the remission of any rent collected on account of the waterway area, and enjoining any further collection of such rent for the waterway area and praying that the *title of the plaintiff for and on behalf of the State of Washington* in and to said waterway area be quieted as against the respondents except the right of the respondent Duthie & Company under "Exhibit B," and that it be decreed that the respondent Railroad Company has no right, title or interest in the waterway area or any part thereof, and for general equitable relief.

This case was not brought by counsel now representing appellant. Counsel then representing appellant in bringing the suit conceived it to be proper not only to obtain a decree quieting the title of the

State to the waterway area as against the adverse claim of respondent Railroad Company, but also that the court might reform the lease set forth in "Exhibit A" between the respondents. The trial court (rightly we have no doubt) held the latter portion of the relief desired would be improper and upon motion struck out paragraph VI, upon which that portion of the prayer was based.

Paragraph VI, however, and the portion of the prayer based thereon is of interest as bearing upon the claims made by appellant in the bill upon the basis of which this court must act in deciding the question raised by appellant's motion to remand.

Whatever rights the appellant in fact had in the suit were clearly based under the bill upon the claim, on behalf of appellant, that it had the sole right on behalf of the State of Washington to lease the waterway area and that all claims of the respondent Railroad Company adverse to such right were invalid and clouded the title, and interfered with the full assertion of the title of the State to the waterway area.

The Court in considering the motion to remand is not concerned with the question as to whether or not the Port had a right to maintain the suit on behalf of the State. The fact remains that it did

in fact bring the suit claiming to represent the State and did assert the State's rights. If this suit was unfounded, that might be a reason for dismissing the bill when the matter was heard in the State Court. But the suit, whether properly or improperly brought by appellant as representative of the State, and claiming to represent its rights and power, was in fact so brought and it is not framed or based at all upon the Port's individual interest of any kind in the waterway area or its ultimate beneficial interest in the rental reserved to the State and which under the Statute ultimately would be partially paid by the State into the Port's Treasury.

Counsel for respondents claim that the title of the State was not involved as the respondent Railroad Company conceded that the State is possessed of the title to the waterway. It is true that it is conceded that the State has the fee, but counsel contends that the respondent has a right to use the waterway area for purposes of access to navigable water, and has the right to wharf out to the Pierhead Line. The title of the State therefore that is conceded is only a qualified title and subject to the alleged paramount easement of respondent. We take it to be elementary that an action to quiet title may be brought to quiet

title against the encumbrance of an easement or servitude, and that is exactly what is sought in this case.

It is worthy of note that counsel for respondents did not upon the trial below contend that appellant had no right to bring this suit as the State's representative, respondent being, apparently, quite willing that the court should entertain the bill as brought and determine the rights between the State and respondent. The question is now raised for the first time in opposition to appellant's contention that the suit should have been and should be remanded to the State Court, it having in fact been brought by the appellant in express terms solely as a representative of the State and to vindicate State rights and to sustain the validity of Chapter 168 of the Laws of 1913, authorizing it to deal with the waterway as the State's representative and on behalf of the State and for rentals to be paid to the State.

THE PIERHEAD LINE.

Quite a controversy has arisen in the briefs on the subject of the pierhead line. We will review the record to make it clear. Before doing so, however, something by way of explanation and reply to the claims of opposing counsel not based on the record.

When we stated in our original brief that "we do not believe, notwithstanding the allegations of the answer, that counsel for respondents will contend that the plat of East Waterway filed by the Harbor Line Commissioners * * * contains any pierhead line" we did so in good faith, knowing the fact to be to the contrary, and supposing that counsel was equally well advised. When we made the statement we had in our possession a letter from the State Land Commissioner stating the fact as we stated it and since receiving respondents' brief we have made a trip to the State capital and personally examined the plat of the East Waterway, made by the Harbor Line Commission, and there is no pierhead line on it. However, no doubt this court must try this case upon the record as made rather than upon the conflicting claims of counsel as to matters not in the record. We will therefore now discuss the record.

The Allegation of the Complaint

Counsel base their claim that the pierhead line is on the Plat of East Waterway made by the Harbor Line Commission principally upon the allegations of the complaint and claim that we are thereby estopped to dispute the fact.

The allegation of the complaint referred to is "that the State of Washington and the United States Government have established in said East Waterway a distance of 125 feet from the shore line of the premises herein described, a pierhead line" (Record p. 2).

This 125 *foot pierhead line is shown by the record to have been established June* 18, 1914 (Record p. 42).

Respondent Railroad Company's predecessors in title got their deeds from the State in the years 1900, 1902, 1904 and 1905, their title actually going back to 1899 when preference applications were made for the purchase of the land (Record pp. 60, 61). And respondent Railroad Co. got its own deed from its predecessors in title in the year 1910. (See Paragraph III of Respondents' answer, Record pp. 25, 26).

The pierhead line referred to in the complaint therefore clearly appears to have been established not only long after the purchase by respondents' predecessors in title, but long after the acquisition of title by respondent and a year after the passage of the Act of 1913, which respondents now claim to be unconstitutional because it seeks to destroy rights claimed under respondents' deeds and which respondents now in the brief seek to have construed with

reference to a pierhead line established after both the deeds and the passage of the law which they attack.

The allegation in the complaint is, of course, inaccurate. The only reference to a pierhead line in any Statute of the State of Washington is in this very law of 1913, Chapter 168, where it is referred to as a "pierhead line established by the United States Government" (See appellant's brief, p. 10).

And the fact that there is nothing in our Statutes providing for the establishment of a pierhead line by the State is recognized by the decisions of our own courts (See appellant's brief p. 67).

The purpose, of course, of the allegation in the complaint was to show the right of the Port as the State's representative to bring the action, there being no provision of law except in the 1913 Act providing for the giving of permits to erect structures in the waterway area and that being conditioned upon the United States Government having established a pierhead line. The statement that the State and the United States Government had established it is, of course, an inaccurate statement, though it does appear that the 125 foot line referred to was approved by the Port Commission as they joined in the petition

to the Government to move the old Government pierhead line back to the 125-foot line.

However, if the words are taken in their broadest and fullest sense, the allegation goes no further than the establishment by the State of the 125-foot pierhead line at some time prior to the filing of the complaint, the date being clearly shown, by the testimony above referred to, to be in 1914 when it was in fact actually established at the request of the Port Commission by the United States Government. It being established long after both the deeds and the passage of Chapter 168 of Laws of 1913, it is wholly immaterial for the purposes of this case who established it. So much for the allegation of the complaint.

The 250 Foot Pierhead Line

The 250-foot pierhead line appears on Exhibits 1 and 3. Exhibit 1 is shown by the certificate endorsed thereon to be a "Copy of those portions of Plates 32, 33, 36, 37, 41, 44, 45, 46, 47 and 48, Seattle Tide Lands, lying adjacent to the East Waterway, said plates being found in Volume 2, Seattle Tide Lands, filed in the office of the Board of State Land Commissioners March 15th, 1895."

Where did this plat come from? By reference to

the Tide Land Act (see Appellant's Brief, pp. 20 to 23) it will be seen that provision is made for the appointment in each county of a Board of Appraisers to plat the Tide Lands in their County (Sections 3 and 6). The plat was to be filed with the County Auditor of the County and one copy delivered to the State Board of Equalization (Section 7), the said Board of Equalization being also created "a Board of Equalization and Appeal" (Section 2). By an Act passed in 1893 the Legislature of Washington made the Board of State Land Commissioners the successor of the State Board of Equalization and Appeal in all matters, and provided for the transfer to the Board of State Land Commissioners of all their records, plats and other papers (See Washington Laws of 1893, pp. 386,387, 388). As the duty of platting the Tide Lands for State purposes was committed to the Board of King County Appraisers; as this board did plat the land (See Exhibit 3 hereinafter referred to) and as they were required to file their plat with the Board of Equalization and Appeal, which went out of existence in 1893, and as the Board of State Land Commissioners was made the successor to their powers and the plat prepared by the King County Appraisers is shown on its face to

have been prepared in 1894 and 1895, it is clear where the plat shown in Exhibit 1 came from. It is the plat of Seattle Tidelands made by the King County Appraisers filed in the office of the State Land Commissioner. The Harbor Line Commission had nothing to do with it. The King County Appraisers had no function in connection with any waterway.

The other plat in the record, showing a 250-foot pierhead line, is Exhibit 3, which is the index sheet of the plat of Seattle Tide Lands "as certified and filed by the Board of Appraisers of Tide and Shore Lands for King County, Washington, 1894-1895." See Exhibit 3. See also testimony explaining it (Record p. 42). Exhibit 3 therefore is clearly the index sheet of the plat of the King County Tide Lands made by the King County Appraisers from which plat certain plates contained within the plat is certified in Exhibit 1 by the State Land Commissioner from the copy filed in the office of the State Land Commissioners.

We call attention to this notation made on Exhibit 3, "Nov. 17, 1894, the U. S. War Department approved and established the outer harbor lines, the waterway lines and the pierhead lines in the East and West Waterways, as indicated on within maps."

This endorsement is made entirely clear by reference to the laws of Washington as they existed at the time the plat was made. The outer harbor lines and the waterway lines were, under the Waterway Act, the Harbor Line Commission Act and Article XV of the Constitution referred to in the briefs, established by the Harbor Line Commission.

The outer harbor line being in deep water, it was of course subject to approval by the War Department of the United States under its jurisdiction over navigable waters, the outer harbor line for practical purposes becoming a pierhead line when established by the State authorities and approved by the War Department.

The lines of the waterway itself were laid out by the Harbor Line Commission and the pierhead line thereon was established by the United States Government. Certainly it must be so assumed in view of the fact that there was at that time no legislation of the State referring to the subject of pierhead lines or authorizing anybody to establish them, and the legislation of Congress did provide for their establishment by the War Department.

It is to be noted also that no plat in the record purports to be a plat of the waterway. Exhibit 1,

which is certified as being on record in the State Land Commissioner's office is not certified as to the waterway at all, but as to the lands adjacent to the waterway and even that plat, as we have demonstrated, is simply the plat made by the King County Tide Land Appraisers. Exhibit 3 is the index sheet of the Plat of the King County Tide Lands.

The law required the Harbor Line Commission to plat the waterway. That these plats of the Tide Lands are not the plat made by the Harbor Line Commission of the waterway, is apparent upon the face of the plats.

If the official plat of the Harbor Line Commission showed the pierhead line or if any claim is made in this case by the defendant as to the waterway based upon the manner of its platting by the Harbor Line Commission, why was not a copy of the plat produced in evidence?

Burden on Respondents as to Pierhead Line.

Appellant brought this action relying upon the right of the State in the waterway area as fixed by the legislation of the State of Washington, including Chapter 168 of the Laws of 1913.

Respondent Railroad Company in its answer at-

tacks the validity of Chapter 168 as being unconstitutional as interfering with its alleged vested property rights. It would seem elementary that respondent must prove any facts necessary to support its claim; if it bought relying upon a plat of the waterway made by the Harbor Line Commission showing pierhead lines, it must, to avail itself of that fact, make proof of the fact. The claim was made in the Answer and no proof given to support it. The claim not being founded in fact, and, even if it had been founded in fact, there being no authority in the laws of Washington for the establishment of such a pierhead line, it would seem clear that respondent must fail in its contention so far as it is based upon any State establishment of such a pierhead line prior to respondent's purchase.

The State Pierhead Line Even If It Existed Would Not Help Respondents.

But even if the Harbor Line Commission had marked in a pierhead line on the plat of the waterway, how does it help respondents? The waterways were not created at all for private purposes but only for purposes of public navigation and in the interest of the public and not private owners of tide lands. In the first place, if the Harbor Line Commission did

put the line on the map, it was wholly beyond their authority, certainly beyond their authority so far as thereby giving to the purchasers of property under the Tide Land Act, with whom they had nothing to do, rights in the waterway.

Not only so, but if we ignore the lack of any legislation authorizing the creation of a pierhead line in the waterway either by the Harbor Line Commission or by any State officer, any action by the State would be subject to the control of the Federal Government to locate pierhead lines in the interest of navigation. Whoever marked in the pierhead line originally, the final authority in placing it in the waterway was the War Department of the United States.

The waterway was created for the benefit of the whole people of the State in the interest of navigation. Wharves and other conveniences of commerce for the enjoyment of the rights of navigation are necessary as the means of communication between land and water. The State in the interest of the development of commerce and the actual use of the waterway, has provided by Chapter 168 of the Laws of 1913, for the erection of such wharves and conveniences of commerce. By way of grace the law offers the right to the upland owners to build these

wharves or structures for a moderate regulatory fee and provides that if they do not avail themselves of the opportunity the State will adopt other means to make the waterway useful by giving the right to erect structures in the waterway area to other persons. Respondents being offered this right declined to avail themselves of it. They now seek to insist that they have a right either to use or to keep the waterway area in front of their property without improvement, and that the State is helpless except as the abutting property owners see fit to improve the waterway area and construct wharves.

And these rights are based upon State deeds, which contain not the shadow of a suggestion of any rights in the waterway or any littoral or riparian rights whatsoever. Such a claim is so against the policy of the State that if these littoral or riparian rights are established in this waterway, it will be a new thing in the State of Washington and the first time that any such rights upon tide water have been recognized since Washington became a State. It would be going far to imply such rights as incident to a State grant, which it is admitted by respondents must be strictly construed.

Question of Estoppel.

Counsel contends that the respondent Railroad Company's predecessor in title bought by reference to the plats and that upon those plats the pierhead line appeared and that the State is estopped to question its existence. However, we think it well settled that an act of a State officer who acts clearly beyond any authority conferred by law cannot estop the State by his unauthorized act. Certainly there can be no estoppel rights here where the only plat shown in the record is one made of the King County Tide Lands by the King County Tide Land Appraisers who had nothing to do with the waterway. That estoppel will not lie in such a case, see the following authorities:

Lee Wilson & Co. vs. United States, 245 U. S. 24; 38 S. C. Rep. 21;

Mullen vs. State, 46 Pac. Rep. 670 (Calif.);

Childress County Land & Cattle Co. vs Baker, 50 S. W. Rep. 756;

Paul vs. Seattle, 40 Wash. 294.

State vs. Superior Court, 91 Wash. 454, 459.

Counsel for respondents in their brief at page 42 cites the above case to show that the boundaries within the waterway when the waterway was laid out

were thereby "segregated from the general mass of the State lands which it holds in its proprietary capacity and became vested in that special class which it holds for public use."

How then can respondents claim that those lands so held for a public use are subject to the easement of respondents to use them for private purposes? The State may, of course, change its laws and revoke its action in setting aside the lands within the waterway for public purposes, but until it has so revoked its action contained in the Waterway Act by subsequent action, how can the Land Department of the State sell to anyone tide lands by a grant which will carry with it as an incidental right, an easement for the private use of the grantee of a portion of this waterway? The case cited by counsel was one in which the Supreme Court held that no rights in the waterway could be condemned in an eminent domain proceeding.

The Rule as to Streets Not Controlling.

Counsel for respondents contend that the right of access by the abutting property owner to the waterway is analogous to the property owner's right of access to the streets adjoining his property. The

contrary rule would seem to necessarily result from the decision in the case of *Newell vs. Loeb*, 77 Wash. 182. Counsel, at page 70 of respondents' brief, attempts to distinguish this case upon the theory that it was based upon the paramount right of the State to improve navigation. It is not so treated by our Supreme Court. The decision was based on no such ground, but squarely upon the ground that the bed of the stream was owned by the State and that "the fact, if it is a fact, that the land of the appellants in this case borders upon the shore of the River, does not give them any rights either in the bed of the stream or in the waters thereof." We have quoted liberally from this case at pages 73 to 75 of our original brief. Certainly the numerous decisions we have cited from our Supreme Court in our original brief clearly demonstrate that under the laws of the State of Washington, a tide land proprietor has no rights in the public waters of the State upon which he fronts which are in any way to be compared with the rights of a lot owner abutting upon a public street.

Shively vs. Bowlby, 152 U. S. 1.

In referring to the above case on page 46 of re-

spondents' brief, counsel for respondents discusses the case as though it were a contest over littoral rights, and as though the question in the case at all involved the rights of the tide land purchaser from the State to littoral rights. We do not deem this a correct statement of the case. The upland proprietor claimed against Bowlby, the State's grantee, littoral rights to wharf out to the Columbia River across the tide lands which Bowlby bought from the State. There was no question involved of littoral rights claimed by Bowlby as incident to the tide lands which he acquired from the State. It is true that in the original complaint the plaintiff who was the State's grantee alleged his rights to wharf out to deep water in the Columbia River and sought to quiet his title against the donation land claimant who disputed his rights under the State deed. But the defendant interposed a counterclaim, basing his rights upon the government grant of the uplands and sought to quiet his title against the State's grantee, all the rights that the defendant claimed under the counterclaim being appurtenant to the upland and not to the tide land. A demurrer having been sustained to the counterclaim, the court on motion of plaintiff dismissed the action and the appeal was prosecuted

finally to this court upon the error in passing adversely upon the counterclaim and dismissing the case, the court saying,

> "The only matter adjudged was upon the counterclaim."

Nothing, therefore, in the case has to do with any littoral or riparian rights as pertaining to conveyances of tide or shore land made by a State.

Respondents' Construction of Tide Land Act.

On page 52 of respondents' brief, respondents quote from Section 12 of the Tide Land Act the provision giving to the successor in interest of an upland owner the preference rights of the upland owner to the extent of the grant. By an examination of the Tide Land Act, a considerable portion of which is printed in our brief, and the quotation above referred to from counsel's brief, it will clearly appear that the only purpose of the part of the Act quoted by counsel was to give to an upland owner's grantee the same rights an upland owner would have. Nothing is to be found in any of the Tide Land Acts which gives to the purchaser of any tide land any riparian or littoral right, the only right conferred being to purchase the tide land itself. We call attention also

to the language of that part of the Act quoted. The quotation is as follows:

> "When the abutting upland owner has attempted to convey by deed to a *bona fide* purchaser any portion of the tide lands in front of such uplands, or littoral rights therein, such right of purchase herein given to the upland owner shall be construed to belong to such purchaser, or to any person, association or corporation claiming by, through or under such purchaser, to the extent of the tract or rights so conveyed."

The words "littoral rights" in this provision of the Statute are followed by the word "therein," referring to the tide lands which are the subject of the grant and not to littoral rights in any other tide land or in any water. The right to use shore and tide lands where appurtenant to upland is treated as a littoral right in the books.

However, the words quoted from the Statute instead of being a recognition by the State of littoral rights in the tide lands, are shown upon their face to be a denial of such rights. The quoted language says when "the abutting land owner has *attempted* to convey * * * tide lands * * * or littoral rights therein." The whole statute was based upon the proposition that the upland owner did not own

the tide land or any littoral rights therein, but because upland owners had quite generally in territorial days assumed that they either had some rights therein or would be granted rights therein by the future State, and had conveyed and improved such tide-lands quite extensively, when the State was organized it granted to the upland owners certain preference rights, to improvers of tide-lands certain prefference rights, and, by the clause quoted by opposing counsel and which we have quoted above, it gave to those who had deeds from the upland owners like preference rights. But the rights were measured by the tide-land Act and only provided for the purchase of the tide-lands and not for any appurtenant littoral rights in any navigable water.

The Distinction Between Tide-Land and Shore Land.

On page 54 of respondents' brief, counsel says that the Statutes of the State define tide-lands as "extending to the harbor line, when established, while the outer boundary of shore lands is not stated." It being contended by respondent that there is no harbor line established here and it being so held by the trial court, and no contention being made as to that point upon this appeal, the definition is not applicable to

the situation here. The definition of tide-lands contained in the Statute is "all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide," followed by the exception as to cases where harbor lines are established (Remington's 1915 Code, Section 6641). Both an inner and an outer boundary is therefore given to tide land.

The same section defines shore lands as "lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water and not subject to tidal flow."

It thus appears that tide lands are bounded on both sides and the shore lands are only bounded on the upland side, and, as we have already pointed out in our original brief, the shore lands were sold by lineal front chain without the specification of an outer boundary, and that distinction is made the basis of the shore land cases cited by counsel and which we have already fully discussed in our original brief. The *dicta* referred to and quoted by respondents in these shore land cases have therefore no force in determining the question as to tide-land rights involved in this case.

Weems Steamboat Co. vs. Peoples Steamboat Co.,
214 U. S. 345.

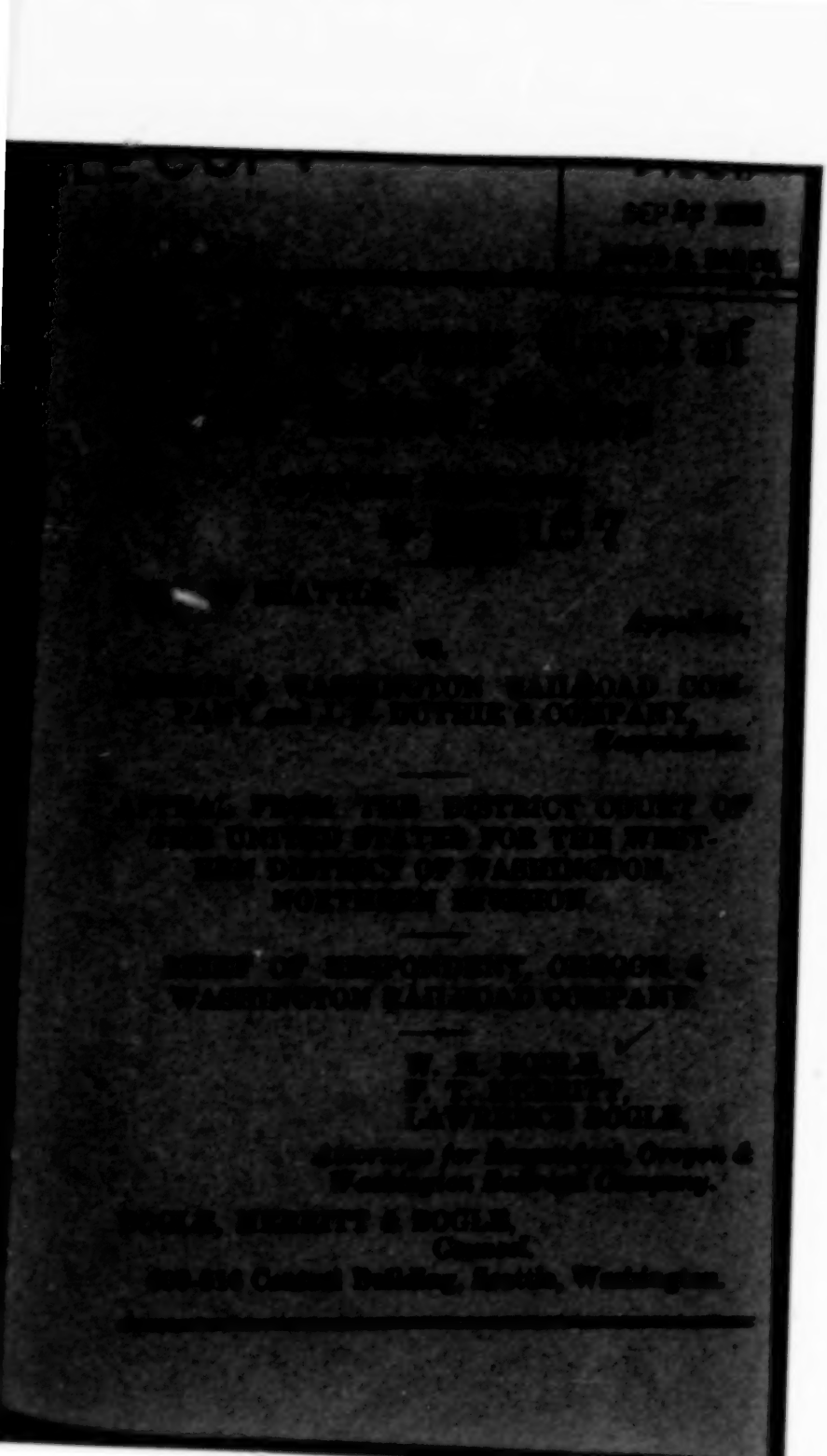
On pages 68 and 69 counsel quotes from the above case as to riparian rights. The quotation itself shows that the question of riparian rights in the State of Washington must be decided by the decisions of the courts of Washington. The cases we have cited in our original brief show that the doctrine stated in the quotation is not applicable in Washington.

Not only so, but an examination of the Weems case itself shows that it was a case where one steamboat company owned the wharves and the land underneath and that the question in the case was as to the right of another steamboat company to enforce a joint user of these private wharves by paying compensation.

We respectfully pray as in our original brief,

HAROLD PRESTON,
O. B. THORGRIMSON,
LEANDER T. TURNER,
Attorneys for Appellant.

PRESTON, THORGRIMSON & TURNER,
Of Counsel.



In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 377.

PORT OF SEATTLE,

Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY and J. F. DUTHIE & COMPANY,

Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF RESPONDENT, OREGON & WASHINGTON RAILROAD COMPANY.

W. H. BOGLE,
F. T. MERRITT,
LAWRENCE BOGLE,

Attorneys for Respondent, Oregon & Washington Railroad Company.

BOGLE, MERRITT & BOGLE,
Counsel.

609-616 Central Building, Seattle, Washington.

INDEX.

	Page
ACT OF 1889-90	52
APPELLANT ASSERTING OWN CLAIM	12
ARGUMENT ON REMOVAL	5
ARGUMENT ON THE MERITS	25
ARTICLE XV, CONSTITUTION OF WASHINGTON	25
ARTICLE XVII, CONSTITUTION OF WASHINGTON	25
BOARD OF STATE LAND COMMISSIONERS	34
CONSTRUCTION OF STATE GRANTS	51
HARBOR AREAS	59
HARBOR LINE COMMISSION ACT	26
PIER-HEAD LINE, HOW ESTABLISHED	39
PORT OF SEATTLE A CORPORATE ENTITY	12
RESPONDENT'S TITLE, HOW DERIVED	40
RIGHT OF ACCESS A VESTED RIGHT	68
STATE NOT A PARTY TO RECORD	5
UPLAND OWNER GIVEN PREFERENCE RIGHT TO PURCHASE	52
WATERWAY ACT	27
WHARVES, CONSTRUCTION AND OPERATION	60

CASES.

Abers v. Smith, 12 R. I. 373	62
Bailey v. Burgess, 11 R. I. 330	58
Bigelow on Estoppel, p. 341	40
Camden Interstate Ry. Co. v. City et al., 129 Fed. 421	5
Chilcot Co. v. Sherwood, 148 U. S. 529	5
Cowles v. Mercer County, 7 Wall. 121	5
Dana v. Commission, 31 Cal. 118	67
Eisenbach v. Hatfield, 2 Wash. 236	43
Farnam on Waters § 101	64
Hardin v. Jordan, 140 U. S. 381, 382	44
Hill v. Bridges, 87 Wash. 260	15
Hopkins v. Clemson Ag. Col., 221 U. S. 636	12
Howell v. Miller, 91 Fed. 129	10
Ill. Central R. Co. v. Adams, 180 U. S. 410	6
Interstate Co. Co. v. Regents, 199 Fed. 509	12
Lincoln County v. Luning, 133 U. S. 530	5
Lindsey v. Hawes, 2 Black (U. S.) 554	40
Miller v. Mendenhall, 43 Minn. 95	51
Miller v. Mendenhall, 43 Minn. 95	62
Miller v. Mendenhall, 43 Minn. 95	67
M. K. & T. R. Co. v. Hickman, 183 U. S. 53	6
M. K. & T. R. Co. v. Hickman, 183 U. S. 53	19

	Page
Muir v. Johnson, 49 Wash. 66	53
Newell v. Loeb, 77 Wash. 182	70
Paine v. Port of Seattle, 70 Wash. 294	15
Pennoyer v. McConnaughy, 140 U. S. 1	10
Puget Mill Co. v. State, 93 Wash. 128-137	48
Reagan v. Farmers L. & T. Co., 154 U. S. 362, 391	12
Scranton v. Wheeler, 179 U. S. 141	8
Scully v. Bird, 209 U. S. 481	6
Shively v. Bowlby, 152 U. S. 1	44
Shively v. Bowlby, 152 U. S. 1	46
State ex rel. v. Forrest, 11 Wash. 227	55
State v. Sup. Ct., 91 Wash. 454	21
State v. Sup. Ct., 91 Wash. 454	35
State v. Sup. Ct., 91 Wash. 454	42
State v. Sturtevant, 76 Wash. 158-166	50
State v. Sturtevant, 76 Wash. 158-166	51
State v. Sturtevant, 76 Wash. 158-166	53
State v. Sturtevant, 76 Wash. 158-166	55
State v. Sturtevant, 76 Wash. 158-166	56
State v. Sturtevant, 76 Wash. 158-166	63
State v. Sturtevant, 76 Wash. 158-166	64
State v. Sturtevant, 76 Wash. 158-166	68
Tindall v. Wesley, 167 U. S. 204	9
Tindall v. Wesley, 167 U. S. 204	22
U. S. v. Lee, 106 U. S. 196	10
U. S. v. O. & C. R. Co., 146 U. S. 526	51
Van Siclen v. Muir, 46 Wash. 38	53
Van Siclen v. Muir, 46 Wash. 38	55
Watson v. Peters, 26 Mich. 508	58
Weber v. Harbor Commissioners, 18 Wall. 57	67
Weems Steamboat Co. v. Peoples Steamboat Co., 214 U. S. 345	68
Wilson v. O.-W. R. & N. Co., 71 Wash. 102	63
Yates v. Milwaukee, 10 Wall. 497	19
Yates v. Milwaukee, 10 Wall. 497	69

PORT OF SEATTLE,

Appellant,

VS.

OREGON & WASHINGTON RAILROAD COMPANY and J. F. DUTHIE & COMPANY,

Respondents.

I.

ARGUMENT ON REMOVAL.

The case was properly removed from the State Court to the Federal Court. The Port of Seattle is a municipal corporation, created by the state, and, under the previous decisions of this court, is a citizen of the state, within the Removal Act, to the same extent as counties, cities, or other municipal corporations.

> *Chilcot Co. v. Sherwood*, 148 U. S., 529;
> *Cowles v. Mercer County*, 7 Wallace, 121;
> *Lincoln County v. Luning*, 133 U. S., 530;
> *Camden Interstate Ry. Co. v. City, et al.*, 129 Fed., 421.

This is apparently conceded by appellant, but the contention is made that the Port of Seattle in this action is suing solely on behalf of the State of Washington, and is merely a nominal party, the state being the real party in interest.

1. The state is not a party to the record; and,

as the requisite diversity of citizenship between the parties of record existed, a proper record case for removal was shown. Whether the record plaintiff was merely a nominal party, and the state the real and only party in interest and against whom alone the judgment would operate, could not be determined without a consideration of the nature of the case, and involves a question on the merits rather than one of jurisdiction.

> *Ill. Central R. Co. v. Adams*, 180 U. S., 410; *Scully v. Bird*, 209 U. S., 481.

The 11th Amendment, in terms, applies only to suits brought against a state. This court, however, in *M. K. & T. R. Co. v. Hickman*, 183 U. S., 53, held that the principle of the amendment would be applied in removal cases where the state was in fact the real, though not the nominal, party plaintiff, and "it may fairly be held that the state is such real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate."

In the case at bar, the defendants were in possession of the waterway area in question, having certain structures extending from the abutting property of the Railway Company to the navigable water of the waterway, and exercising the right of

access from such abutting lots to the navigable water across this intervening area. The plaintiff sought to enjoin the Railway Company from enjoying or exercising this right of access, asserting that it—the plaintiff—had been authorized by the state to use, or lease the right to use, this waterway area. Whether the state had or could grant this right to plaintiff, with respect to this particular area in front of defendants' lots, presented a question for judicial ascertainment and decision, and defendant Railway Company, being a nonresident, had a right to remove the case in order to have this question determined by the Federal Courts.

Where the state is not a party of record, it is immaterial, in applying the principle of the amendment, whether the party claiming or asserting authority from the state is the plaintiff or defendant in the action. Whether the state is the real and only party in interest depends upon a consideration of the real objects of the suit and the effect of the judgment therein, and not upon the position of the parties as plaintiff or defendant.

The respondent Railway Company could have maintained an action against the Port of Seattle to enjoin it from interfering with the Railway Com-

pany's possession of this area and its enjoyment of the right of access over it; and the fact that the Port claimed to be so interfering or threatening to interfere by authority of the state, or asserted the state's ownership and the Port's right to control and regulate the use of the area under the authority and power conferred upon it by the state, would not have debarred the Railway Company from maintaining such action in the Federal Courts, the requisite diversity of citizenship being shown.

In *Scranton v. Wheeler*, 179 U. S., 141, suit was brought by Scranton to enjoin Wheeler from obstructing or interfering with riparian rights claimed by Scranton. Wheeler had acted solely as an officer or agent of the United States and claimed to be acting wholly under authority of the Government. This court held that the United States was not a party, and the action could be maintained. The court said (p. 152):

> "If the plaintiff was entitled to access from his land to navigable water and if the defendant stood in the way of his enjoying that right, then the court was under a duty to inquire whether the defendant had or could have any authority in law to do what he had done; and the suit was not to be deemed one against the United States because in the consideration of that question it would become necessary to ascertain whether the defendant could constitu-

> tionally acquire from the United States authority to obstruct the plaintiff's access to navigable water in front of his land without making or securing compensation to him. The issue, in point of law, was between the individual plaintiff and the individual defendant, and, the United States not being a party of record, a judgment against Wheeler will not prevent it from instituting a suit for the direct determination of its rights as against the plaintiff."

In that case, Scranton was in the possession and enjoyment of the right of access, and in the case at bar the Railway Company was similarly in the possession and enjoyment of the right of access. Wheeler claimed the right to obstruct the right of access under and by authority of the United States, while the Port claims a similar right under and by authority of the state. Whether the Port had or could have a right to deprive the respondent of the right of access to navigable water in front of its land, was a question to be decided by the courts between these parties to the record.

In *Tindall v. Wesley*, 167 U. S., 204, a suit to recover possession of real estate, the defendants having possession and claiming the right to such possession solely as officers of the state and under its authority, was held to be within Federal jurisdiction, as the state was not a party nor bound

by the judgment in the case. See also *U. S. v. Lee*, 106 U. S., 196.

In *Pennoyer v. McConnaughy*, 140 U. S., 1, a suit to enjoin state officers from selling and conveying land by authority from the state, the plaintiff asserting title to the land, was held not to be a suit against the state. The same principle was applied by Mr. Justice Harlan in *Howell v. Miller*, 91 Fed., 129.

In order to entitle it to a decree in this case, it was necessary for the plaintiff to prove that respondent was not the owner of the right of access across this area; that the ownership was either vested in this plaintiff, or was vested in the state and that the state had authorized this plaintiff to maintain suits to prevent defendant from using the area for access to the navigable water. These are questions going to the merits, upon which the respondent is entitled to a trial in the Federal Court. The state has not intervened in the case; there is no authority in law for binding the state by any judgment against this plaintiff; and, as held in *Tindall v. Wesley, supra*, "the state not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to

the state to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute."

Conceding that the principle of the 11th Amendment will be applied to the removal act where the representative of the state is the plaintiff, these cases seem to determine conclusively that the state is not the real party in interest in a controversy between a citizen in possession of property or property rights and other individuals seeking to interfere with such possession or the enjoyment of the right and asserting authority from the state to do so. The essential issues are the same and the real parties are the same, whether the suit is brought by the one party or the other. If the Port can be considered as an officer or agent of the state, it cannot interfere with respondent's possession of property nor exclude Federal jurisdiction by merely asserting that respondent has no title. Whether it has right to possession is a judicial question, involved in the merits of the case. The judgment imposes no liability upon the state, requires no affirmative action by its officers, deprives it of no property it now possesses, and takes from it no revenue it ever enjoyed. The decree, insofar as it is favorable to respondent, decides that the Act of 1911 is un-

constitutional and void, as to the area occupied by respondent under prior grants from the state; and therefore the plaintiff had no justification for interfering with respondent's possession.

2. The Port of Seattle was created by the state, and given a corporate entity, with power to acquire and own property, enter into contracts, incur indebtedness, levy taxes, manage and control waterway areas belonging to the state and enjoy the greater part of the revenue therefrom for its own corporate purposes. It has the power to sue and be sued in its own corporate name, and exercised that power in this case. It would seem that the state thereby consented to sue and be sued in the name of this municipality, insofar as it entrusted the management of its property and consented to be represented by the municipality.

> *Interstate Co. Co. v. Regents*, 199 Fed., 509;
> *Hopkins v. Clemson Ag. Col.*, 221 U. S., 636.

If the state has consented to sue and be sued in the name of this municipality, a non-resident sued by it is entitled to remove the case to the Federal Courts.

> *Reagan v. Farmers L. & T. Co.*, 154 U. S., 362, 391.

3. An examination of the record, and of the

state statutes creating the plaintiff as a municipal corporation, shows clearly that the plaintiff is, in reality, asserting its own claim of ownership of the right to use, exclusively, this waterway area for its own corporate purposes and for the revenue it may derive therefrom. The state has, at most, only a remote, indirect and contingent interest in the results of the suit.

The complaint, in paragraph IV, alleges as the basis for the relief it seeks that the waterway area in question "is within the jurisdiction of the plaintiff acting for and on behalf of the State of Washington;" that respondent Railway Company has not obtained from nor applied to appellant for a permit to use this area, but, without any such permit, it had leased its certain lots abutting on this waterway to Duthie & Co., and by the terms of this lease respondent "purports to claim and does claim jurisdiction over said waterway area;" that respondent in fact "has no right, title or interest in said waterway area," and that any such claim upon its part is unfounded. The lease referred to is made an exhibit to the bill of complaint. The only right, title or interest, or, as the complaint phrases it, the "jurisdiction," which respondent claimed in the lease in or over the waterway area, was the right

of access, including the right to "wharf-out" to the pier-head line in the waterway, subject to proper supervision by Federal and State authorities. The suit was broght to enjoin respondent from exercising the right so claimed by it.

The Port District was created under the Act of 1911, Session Laws, p. 419, as amended by Chapter 62, Session Laws of 1913. By these Acts the Port was given power to acquire, by purchase or condemnation, lands and other property; to construct, condemn, purchase, conduct and operate, wharves, docks, ferries, canals and other harbor improvements, and rail and water transfer and terminal facilities; "to improve navigable and non-navigable waters of the United States, and of the State of Washington within the Port District * * * *to regulate and control all such waters and all* natural or artificial waterways (waterways of commercial waterway districts excepted) within the limits of such Port District, *so far and to the full extent that this state can grant the same*, and remove obstructions therefrom," and to fix its rates for wharfage, dockage, etc. The county treasurer is made the treasurer of the Port District, etc. In addition to the powers specified, the Port District has further power to levy taxes, issue bonds, and in general exercise

similar powers to those exercised by counties, including the power to sue and be sued.

See—

Paine v. Port of Seattle, 70 Wash. 294;
Hill v. Bridges, 87 Wash. 260.

The boundaries of the appellant Port District are coterminous with the boundaries of the county in which it is located.

The Act of March 22, 1913 (Chapter 168 Session Laws, 1913), quoted by appellant in its brief, commencing on page 10, provides that no structures shall be allowed in any of the artificial waterways created by the state between the boundary and the pier-head lines, except under permit or lease from the State Land Commissioner, with respect to waterways located outside of Port Districts, or permits or leases from the Port District as to such waterways located within such district, and prescribing the rate of rental to be charged for such leases. The rental prescribed for this area within Port Districts inures seventy-five per cent. to the Port District and twenty-five per cent. to the state. In event the Port District constructs its own improvements thereon, as it is authorized to do, the Port retains the entire income therefrom, the state receiving no part of it.

The complaint, as it stood at the time the case was removed, sought a decree of the court (a) enjoining the defendant Railroad Company from "claiming or asserting any jurisdiction over the waterway area" described in the complaint; (b) that the lease from the Railroad Company to Duthie & Company be reformed "by striking therefrom all passages therein in which the said * * * Railroad Company claims jurisdiction over said waterway area and attempts to grant to said J. F. Duthie & Company any right, title or interest therein;" (c) that the Railroad Company be required to return any such rents collected for this waterway area and be enjoined from making any further collections of such rentals; (d) that the title of complainant, for and on behalf of the state, in and to the waterway area, be quieted as against both defendants; and (e) that it be decreed that the Railroad Company as owner of abutting lots, "has no right, title or interest in said waterway area, or any part thereof, or any jurisdiction thereof."

It will thus be seen that the bill asserts the right of the Port District to exercise control over this water area, and to prevent the defendants from disputing its right of control, or from themselves using it, without a permit or lease from the Port District.

After the case was removed, paragraph VI of the complaint was stricken by the court on motion of respondent, thereby eliminating from the case all questions relating to the dealings between the respondent and J. F. Duthie & Company.

The gist of the complaint was the asserted right of the Port District to prevent respondent from using this waterway area except under a permit or lease from the Port, and to secure a decree establishing the Port's right to use this area for purposes of revenue. The power or right to control the use of this waterway area, if it did not belong to the respondent, was vested in the Port District by the grant contained in the Acts creating the Port and pertained to it as a municipal corporation by virtue of that grant. This grant, as set out in the Act creating Port Districts, was "to regulate and control all such waters and all natural or artificial waterways * * * within the limits of such Port District, so far and to the full extent that this state can grant the same and remove obstructions therefrom."

The later Act of the same session of the Legislature—Chapter 168 of the Laws of 1913—did not change the powers of the Port, but merely asserted that the area between the boundary and pier-head lines in artificial waterways located within the Port

Districts should remain free from obstructions, except under permits or leases granted by the Port District, and prescribing the terms upon which such permits might be granted, or by use by the Port District itself.

The fact that the state has reserved to itself one-fourth of any rentals which may be received by the Port District from their waterway leases, does not make the state the "real party in interest" in a suit brought by the Port District to establish or determine its right to control the area and prevent use thereof by respondent without a lease from the Port.

> *M. K. & T. Railway Co. v. Hickman*, 183 U. S., 53.

The suit was not brought to collect rents, in which the state would have a one-fourth interest; but to establish the Port's right to control the use of this waterway area in front of respondent's lots. The so-called Port Acts (Acts of 1911 and 1913) granted this right of control to the Port "so far as and to the full extent that this state can grant the same." (Page 24, App. Brief.)

The power of regulation and control given to Port Districts under the Acts of 1911 and 1913 are similar in character, although not in extent, to those

given the City of Wilwaukee by the State of Wisconsin and which the city asserted in the case of *Yates v. Milwaukee*, 10 Wall., 497. The Federal Court, in the first instance, and this court on appeal, entertained jurisdiction of a suit to restrain the city from interfering with the complainant's wharf under this delegation of "public authority on the subject of wharves," etc. There seems to have been no suggestion even that the state was the real party in interest, and that the court was without jurisdiction under the 11th Amendment. The instant case does not differ in principle from an action by a county to cut off an abutting property owner from a public highway except on condition of paying a rental therefor.

The respondent claims the right of access to its lots from the navigable waters of this waterway over this strip between the shore and pier-head line, and the right to "wharf-out" to the pier-head line, under the grants from the state to its predecessors in title made prior to the passage of the Acts of 1911 and 1913, and contends that the rights of regulation and control granted to the Port by the state by these later Acts are subordinate to respondent's rights of access acquired through prior grants from the state. In dealing with these areas and in

making leases thereof, the Port acted in its own name. See "Ex. B" to complaint, Vol. 1, Tr. of R., p. 9. If the rights claimed by the Port should be sustained, the utmost interest of the state therein would be a contingent interest of one-fourth in any rentals the Port might subsequently collect from any leases it might hereafter make of this area; the Port, however, having the right to make its own improvements thereon, in which event it retains all of the rentals or earnings.

Appellant states its theory of the interest of the state, on page 43 of its brief, as follows:

> "It will not be denied that the title to the waterway areas is vested in the state. This suit is brought for the purpose of quieting the state's title, basing the right of the Port upon the powers conferred upon the Port as the representative of the state both in the Port Act from which we have quoted in the statement of the case and in Chapter 168 of the Laws of Washington of 1913 which has been set forth in full."

It is true that one relief asked in the complaint is "that the *title* of the plaintiff, for and on behalf of the State of Washington, in and to said waterway area, be quieted as against" the respondent. But the title to this waterway area is not involved, and is not disputed by respondent. Section 5 of the Act of 1890 (Appellant's Brief, p. 14), under which

the waterway was created, provides that "all public ways that may be established under the provisions of this Act are, and shall forever be, reserved from sale or lease, as public ways for water craft." The State Supreme Court has held that under these acts the areas within the boundaries of the waterways are dedicated to public use, and held by the state in trust for such public use, and not in a proprietory capacity. *State v. Sup. Ct.*, 91 Wash., 454. The *title* is and has always been in the state in trust for public use. The right of access to and from the abutting property to and from the navigable waters of this "public way" beyond the pier-head line, and the right to construct wharves and other aids to commerce and navigation in order to conveniently enjoy the right of access, are the rights which respondent claimed and which the bill of complaint sought to enjoin respondent from exercising. The gravamen of the bill was the asserted right to prevent this modified or restricted use of this strip for purposes of access to the abutting property. There is no averment of fact in the bill of complaint which brings the *title* into dispute. The lease from respondent to Duthie & Company, made a part of the bill of complaint as "Exhibit A," does not disclose any claim of title to the waterway, but only a claim of right to use this waterway area for pur-

poses of access from its lots to the navigable waters; and the real scope and purpose of the bill of complaint is to determine whether respondent had such right of access over this strip. There is no Act of the Legislature of the state purporting to vest in Port Districts authority to bring suits to determine or quiet the title of the state to this or any other class of property. An adjudication on the title of the state to any property, in a suit brought by a Port District, would not conclude the state. *Tindall v. Wesley*, 167 U. S., 204, 223. If the right of access did not pass as an appurtenance to the state's grants of these abutting lots, the right to control the use of this waterway area was granted by the state to the Port District by the statutes of 1911 and 1913, coupled with an interest in the revenue it might derive therefrom, and in asserting such right, the Port is asserting its own corporate rights and powers for its own benefit. On the other hand, if the right of access did pass as an appurtenance to abutting lots by the state's grants in 1904, there is nothing in the statutes of 1911 and 1913 authorizing Port Districts, on behalf of the state, to repudiate these prior grants or to maintain any suits in the name or on behalf of the state to challenge or seek a judicial determination of the legal effect of the prior grants. The

Port can seek such determination in its own name and upon its own asserted interest, but not as the authorized representatives of the state. Before it can claim the immunity pertaining to the state, it must not only purport to assert the state's right, but must show that it is authorized by the state to take such action on behalf of the state. In this case, the interest or right asserted by the Port is its own interest or right, not that of the state; and it has not shown any lawful authority for suing on behalf of the state, or any authority for concluding the state by the adjudication it seeks.

That the only issue presented by the bill of complaint related to the rights of the Port District to control and regulate the use of this waterway strip, under the purported grants of that right in the Acts of the Legislature previously cited, is further shown by the final decree in the lower court, which dealt only with the right of access to the abutting lots across the strip.

A plaintiff can in no event claim the immunity belonging to the state unless the relief sought inures to the state alone. He cannot join or tender issues the relief upon which would inure partly to himself and partly to the state. The relief sought in the present suit would not inure "alone" to the

state. In at least one of the issues presented by the complaint—that relating to the repayment of the rent received by respondent from Duthie & Co.—the state could not have any possible interest. If the possible future collection of rentals for the use of the waterway area can be considered as within the relief sought by the bill, such rentals would not inure to the state "alone;" on the contrary, seventy-five per cent thereof would inure to the Port itself; and if the Port used the waterway area in its own projects, the entire benefit would inure to it. The "real parties in interest" therefore are the Port District, claiming the right to control the use of this water area or strip under the legislative grant to it, and, as a part of such right of control, to enjoin respondent from any use of the area without a lease from and payment of rentals to the Port District, on the one side, and respondent Railway Company in possession and claiming a right to use this area for access to its abutting lots, under prior grants from the state, on the other side. The state, at most, has only an indirect and contingent interest in the result, depending upon the use the Port might make of the area, if control was awarded to it. If the Port constructed its own wharf on the area, the state would receive nothing from it; if the Port leased the wharfage privilege to a third

person, the state would receive one-fourth of the rent.

II.

ARGUMENT ON THE MERITS.

By Sec. 1, Art. XVII of the Constitution of the State of Washington, the state asserted "its ownership to the beds and shores of navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."

Sec. 1, Art. XV of the State Constitution is as follows:

> "The Legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof on either side. The state shall never give, sell or lease to any private person, corporation or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide and within not less than 50 nor more than 600 feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its right to control the same relinquished,

> but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce."

Sec. 2 of the same article requires that

> "The Legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures upon the areas mentioned in section 1 of this article, but no lease shall be made for any term longer than thirty years, or the Legislature may provide by general laws for the building and maintaining upon such area wharves, docks and other structures."

Pursuant to Art. XV the Legislature at its first session passed the Harbor Line Commission Act quoted on pages 18 and 19 of appellant's brief. This Act created a Board of Harbor Line Commissioners and imposed upon them the duty of locating and establishing harbor lines in all harbors, estuaries, bays and inlets of the state within or in front of the corporate limits of any city or within one mile thereof, and provided that they should file a plat thereof in the office of the Secretary of State, and a duplicate plat in the office of the clerk of the city or town where the harbor lines were located. At the same session of the Legislature the Tide Land Act was passed, quoted in appellant's brief beginning on page 20. This Act provided for the survey, platting and appraisal of the state tide lands by a

board called the Board of Appraisers, with a view to the sale thereof by the state. The Act provided that the board should prepare plats showing all shore and tide lands surveyed and appraised, and extend the lines of the United States survey over the same, and that one copy of the plat should be filed with the County Auditor in each county affected, and one copy delivered to the State Board of Equalization.

At the same session and on March 28th, the Legislature passed the Waterway Act quoted in appellant's brief beginning on page 14. This Act provided for the establishment of one or more "public ways across all of the tide flats that are situated within or in front of any incorporated city or town within the State of Washington." Also, that such public ways should be not less than 50 nor more than 1,000 feet wide, and should commence at the outer or deep water end in not less than 20 feet of water at low tide, and extend inland across the state's tide lands; that such public ways when established should be well defined and marked by a post, and that

> "All such waterways shall be correctly surveyed and connected by metes and bounds with the government surveys or such other permanent land marks as will make a lasting record; and a correct plat of all public ways so estab-

lished shall be made, one copy of which shall be filed with the Secretary of State, one copy with the Commissioner of Public Lands of the state, one copy shall be kept in the office of the chairman of the Board of Harbor Line Commissioners, and each county shall be furnished with a correct plat of all such public ways established or within its borders, and such plats shall be filed as city or town plats are filed, and become a part of the county records."

The Act defined tide flats or tide lands as used in the Act as meaning "all lands over which the tide ebbs and flows and which is bare at low tide."

By Section 7 of the Act, the duty of establishing and laying out these public ways was devolved upon the Board of Harbor Line Commissioners.

In 1893 the Legislature passed an Act (quoted in appellant's brief beginning on page 16) providing for the excavation of these public ways, and giving a lien upon tide lands adjoining to pay the costs and expenses of such excavation.

Pursuant to these constitutional and statutory provisions, the Board of Harbor Line Commissioners in 1894 and 1895 established the harbor lines on the waterfront on Elliott Bay, and also established and laid out certain waterways across the tide lands lying south of Elliott Bay. There were two main waterways created, one lying to the west-

ward and called "West Waterway," and which connected directly with the main stream of Duwamish River; the other is called "East Waterway," and is the one involved in this suit. It commences near the southeast corner of Elliott Bay and extends south to a point near Spokane Street. This part of the waterway as laid out was 1,000 feet wide. From a point near Spokane Street a smaller waterway, being an extension of East Waterway, but only 400 feet in width, was created, extending southwesterly to a connection with Duwamish River or the West Waterway. A third way called "Canal Waterway," extended from a connection with East Waterway near Spokane Street easterly across the tide lands to the uplands on the east. Canal Waterway was 300 feet in width. Within the limits of East Waterway extending from Elliott Bay to the point near Spokane Street, the Commissioners established lines on each side of the waterway and 250 feet distant from each shore, which were marked and designated on the plat "Pier Head Line," leaving a fairway 500 feet in width. No similar line was established or shown in either of the two smaller waterways named above.

On November 17, 1894, the United States War Department also approved these harbor lines on

Elliott Bay and pier-head lines in East and West Waterways as established by the Harbor Line Commission.

Plaintiff's "Exhibit 1" herein shows the main East Waterway 1,000 feet in width, with pier-head lines established therein, the extension of East Waterway 400 feet in width, in which no pier-head lines were established, and a small part of Canal Waterway 300 feet in width. It also shows the outer and inner harbor lines on Elliott Bay adjoining the outlet of the waterway. Plaintiff's "Exhibit No. 3" also shows the location of both the East and West Waterways with respect to the adjoining tide lands and the pier-head lines therein.

In 1914, by joint action and consent of the War Department, the Port of Seattle, and abutting property owners, the pier-head lines in East Waterway were changed or drawn back to a distance of 125 feet from the shores, leaving a fairway of 750 feet in width, and a strip of water area of 125 feet in width on each side, between the new pier-head lines and the shore.

1. Appellant first contends that this pier-head line was not established by the Harbor Line Commission, but was sketched into the plat by the Board of Appraisers; that it was unauthorized by law,

and was not the state's act. (Brief, pp. 56-64.) This position is, in our opinion, foreclosed by the pleadings, and is not well founded in fact.

The bill of complaint (paragraph IV) specifically alleges "that the State of Washington and the United States Government have established in said East Waterway a distance of 125 feet from the shore line of the premises herein described a pier-head line." This allegation is admitted in paragraph II of the answer of respondent Railroad Company. The fact of the establishment of this pier-head line by the state being thus admitted in the pleadings, no evidence was introduced during the trial of the case to prove the fact. No suggestion was ever made at any time during the progress of the case that the pier-head line was not established by the state until the question was raised by appellant's brief in this court. The existence of the pier-head line is recognized by the appellant in the permit granted by it to defendant Duthie & Company, made Exhibit "B" to its complaint. On page 62, Vol. I, Transcript of Record, is also found Resolution No. 142 adopted by the appellant on the 10th day of September, 1913, in which the pier-head lines are referred to as indicated on the official map of the harbor of Seattle in East Waterway.

In the opinion of the trial judge in the court below this finding was made:

> "In 1894 and 1895 the State Board of Land Commissioners pursuant to law (Laws 1889, 90 and 93) adopted and filed a plat of the state-owned tide lands creating the East and West Waterways, and establishing a pier-head line 250 feet from the bulkhead line, and approved contracts for the excavation of said waterways and filling in of the state-owned tide lands in the vicinity thereof."

In the abstract of the testimony of witness Blackwell, Vol. I of Transcript, p. 42, he states:

> "Plaintiff's Exhibit No. 1 shows a pier-head line in the East Waterway 250 feet from the bulkhead or property line. There is among the original records in the local United States War Office, Engineers' Department, a similar plat showing the same lines and the East Waterway laid out in the same manner with pier-head line 250 feet from the property line, and having upon it an endorsement that the pier-head line was approved by the War Department November 17, 1894, and a later endorsement that on June 18, 1914, the pier-head line was drawn in to 125 feet instead of 250 feet as formerly approved."

As stated above, the establishment of a pier-head line by the state having been admitted in the pleadings, no testimony was introduced on the trial to establish that fact. The case was tried by the court below on the basis of the fact as admitted in the pleadings, and we respectfully urge that the appel-

lant cannot at this stage of the proceedings question the existence of the pier-head line as a feature or part of the waterway as established by the authority of the state.

In this connection, appellant, on page 59 of its brief, makes the following statement:

> "We do not believe, notwithstanding the allegations of the answer, that counsel for respondent will contend that the plat of East Waterway filed by the Harbor Line Commissioners, and who alone were authorized to plat waterways (though they have no power to fix pier-head lines or do anything having to do with operations of a waterway when so platted) contains any pier-head line. It does not, in fact, though as a copy of that plat is not in the evidence this court cannot pass upon the fact."

We do contend that the pier-head lines shown on East Waterway were established by the Harbor Line Commission. We think, in view of the above statement of appellant, we are warranted in quoting from the brief filed on behalf of appellant on the trial of this case in the court below. After citing the constitutional and statutory enactments bearing on the subject, the brief contains this statement:

> "In the years 1894 and 1895, the following things were done under and by virtue of the various acts stated: First, the establishment by the State Board of Land Commissioners acting as a Harbor Line Commission of the East and

> West Waterways extending across state-owned tide lands; the establishment of a pier-head line 250 feet from the bulkhead line; this made the waterway area 250 feet wide on each side of the waterway. Second, the adoption and approval of the pier-head line laid down by the Board of State Land Commissioners by the Secretary of War. Third, the adoption and filing of a plat of the state-owned tide lands in Seattle. Fourth, the making of two contracts between the State of Washington and Eugene Semple for the excavation of the East and West Waterways and the filling in of the state-owned tide lands in the vicinity thereof."

The Legislature of 1893 (Session Laws 1893, p. 386) created a "Board of State Land Commissioners" and conferred upon the Board the powers of the Harbor Line Commissioners. This explains the statement of appellant's counsel in the court below that the pier-head lines were established by the State Board of Land Commissioners. It should be stated, however, in justice to the present counsel for appellant, that this action was brought and tried in the court below by other counsel representing the appellant. In the petition for rehearing filed in the court below by the present counsel, however, no suggestion was made questioning the validity of the establishment of the pier-head lines. The position of counsel with respect to the pier-head lines was stated in the petition for rehearing as follows:

> "*Effect of Pier Head Line on the Plat.* Counsel for defendant claims that the establishment of a pier-head line showed wharves to that line were contemplated, and claims that it must have been contemplated that the owner of the lands abutting upon the water would have the right to wharf out. Not so. The pier-head line emphasized the fact that the lot lines do not carry to the navigable line of the water, but that a strip of tide land intervened between the lots bought by the defendant and the navigable part of the waterway. The Sturtevant case made the right of wharf out absolutely dependent upon ownership to the line of navigability."

It will be observed that counsel admitted that the pier-head lines were legally established, and contended that the legal effect was to exclude the areas between the pier-head lines and the shores from the waterway—such areas remaining simply "tide lands;" the argument based thereon being to the effect that respondent's lots did not abut upon the waterway at all. This contention was in direct conflict with the decision in *State v. Sup. Ct.*, 91 Wash. 454, that the entire area between the boundaries of these waterways was held by the state in trust for public use. Consequently appellant's counsel again changed their position to the contention that no pier-head lines had been legally established.

The suggestion made by counsel in their present brief that the pier-head lines were sketched in the

plat by the Board of Appraisers is purely gratuitous. There is nothing in the record suggesting such an origin of the pier-head lines. The sole duty of the Board of Appraisers was to plat and appraise the tide lands and show their relation to the waterfront and the waterways. The statute required the Harbor Line Commission to establish and lay out both the harbor areas and the waterways; and it is manifest that both statutes contemplated that the plats filed by both the Harbor Line Commission (or its successor, the Board of State Land Commissioners) and the Board of Appraisers in the state and county offices, should be complete, in that they should show both the tide lands as surveyed, and the waterways as surveyed, and their relation to each other.

Counsel suggest, rather than argue, that the Commission charged with the duty to establish and lay out the waterways, had no authority to establish pier-head lines therein. As stated before, we do not think this question is open in the present case because the establishment of the pier-head lines by the state is admitted in the pleadings; but if it was an open question under the pleadings, we think the record shows that the establishment of these lines was authorized by the state, although the evidence

relating to it is merely incidental. The Waterway Act did not define either the length or width of these waterways, except the requirement that they should be not less than 50 nor more than 1,000 feet wide, and should commence at the outer or deep water end in not less than 20 feet of water at low tide. The Act devolved upon the Commissioners the duty of *establishing* these ways. They were intended as aids to commerce and navigation, and it was the duty of the Commissioners in establishing them to so locate them and give them such incidents as would carry out the object of the Legislature in providing for their establishment. The East Waterway proper was laid out 1,000 feet in width and was intended as a terminal or basin—a place where vessels would load and discharge cargo. Wharves and piers were necessary to the full utilization of the waterway for the purposes intended. It was not practicable nor contemplated that vessels should lie alongside the bulkhead or shore line for the purpose of loading or discharging. The excavation of the waterway under the Act approved March 9, 1893, was made with a slope from the shore or bulkhead line out to the pier-head line 125 feet from shore. As stated by defendant Blackwell (Transcript of Record, page 47), the depth of the excavation at the pier-head line was 26 feet and

it sloped gradually to the shore line, and "shallows up there so that at the shore line it would be bare at times of extreme low tide. There would be no water there. It is not in a practical way navigable." Wharves or piers were a necessity to any practical use of the waterway for the purposes contemplated in its establishment.

The plat of the waterway as established by the Commission, and with the pier-head line distinctly shown thereon, was filed in the state, county and city offices, as required by the statute, and became a part of the public records. The adjoining tide lands owned by the state were also platted, and this plat, which also showed pier-head lines in the waterway, was filed in the proper state and city offices. Thereafter, the state authorized the sale and sold the adjoining tide lands by reference to this plat. The pier-head lines as shown on the waterway plat were approved and adopted by the War Department as the line beyond which obstructions to navigation would not be permitted. Thus the official record of both the state and the United States showed the pier-head lines as a part of the established waterway.

The Act of the Legislature of 1913, under which appellant is claiming the right to control the use

of this waterway area between the shore and pier-head line, recognized the pier-head lines as an established fact and feature of the waterway. Extensive improvements extending out to and beyond the pier-head lines as at present located were made by owners of abutting lots long before the Act of 1913 was passed, without challenge by the state prior to the passage of that Act, so far as shown by the record. (Tr. of R. pp. 46, 47.)

We think that these outstanding facts show that the Harbor Line Commisisoners were authorized to establish these waterways, with pier-head lines separating the wharfage area from the fairway, as a part of the established waterway; and that the state, not only by the acts of its officers, but by its legislation, has recognized these pier-head lines as a feature or part of the waterway; and has sold the abutting lots by description based upon these official plats showing the pier-head lines as a part thereof. The plats, showing the pier-head lines, having been made by state officers, and filed as required by the state law, acquiesced in by the state for years, and the lots sold according to these plats and the money received and kept by the state, it and its grantees are now estopped to say that the pier-head lines shown on the plat were not established by authority of the state.

Lindsey v. Hawes, 2 Black (U. S.) 554.
Bigelow on Estoppel, 341.

2. Respondent Railroad Company acquired title to the lots abutting upon this waterway under mesne conveyances from the state. This title originated under a decree of the Superior Court of the State of Washington for King County, dated January 23, 1899, awarding the preference right of purchase under the then existing state laws to Kinnear and others. Under the state statutes (Session Laws, 1889-90, pp. 431, 435), the owner of uplands was given by the state a preference right to purchase from the state the tide lands in front of his uplands. Under the decree in the cause above mentioned, awarding this preference right to Kinnear and others, contracts were made by them with the state pursuant to the statute for the purchase of these tide lands. These contracts were complied with and the lots conveyed by the state in 1904, and through mesne conveyances acquired by respondent Railway Company in 1910 for a total purchase price of $288,060.00. The deraignment of respondent's title is shown in Volume 1, Transcript of Record, pages 58 to 61. The deeds from the state, under which respondent deraigns title, designated the property as "tide

lands of the first class," and described it by lots and blocks, "as shown on the official map of Seattle Tide Lands, filed with the Board of State Land Commissioners, at Olympia, Washington, March 15, 1895." (Record, p. 58).

The map referred to is "Exhibit 1" in this case. This map, which shows the lots as fronting on the Waterway, and also shows the Pier-Head lines as established in the Waterway, is made a part of the state's deed by this reference. Whether the right of access to the navigable waters in the Waterway passed to the purchaser of these abutting lots is, of course, a question of the proper construction of the state's grants.

It is the contention of respondent that the purchase of these lots abutting upon this artificial waterway from the state gave to the purchaser the right of access to the navigable waters of the waterway and the right to make access convenient for navigation and commerce by appropriate facilities, such as wharves, docks and piers. The appellant, on the other hand, contends that the abutting owners acquired no such right of access, and that the state retained the right to, and by the Act of 1913, did, carve out a strip of water area extending from the shore of the waterway to the pier-head

line, which had the effect of cutting off access to the waterway from the abutting property; and it further claims that it has derived from the state the right to lease or use this area for purposes of revenue, and to prevent the abutting property owners from using it for purposes of access, except under lease from the appellant. This presents a question of construction of the state's grant, and is to be decided by the local law.

The Supreme Court of Washington has held that the lands included within the boundaries of the waterways created pursuant to the Act of 1890, were thereby withdrawn from the general mass of public lands held by the state as proprietor or owner and dedicated to a public use.

> "The lands within their boundaries thus become segregated from the general mass of the state's lands which it holds in its proprietary capacity, and become vested in that special class which it holds for the public use."
>
> *State v. Sup. Ct.*, 91 Wash., 454, 459.

The decree in the case at bar followed this decision and held that the port had no proprietary right or ownership of the area within the boundaries of the waterway.

The same Legislature that created the waterways authorized the extension of streets over these

tide lands; and the court, in the case last cited, held that the lands embraced within the boundaries of the waterways were thereafter held by the state in the same capacity it held the lands within the borders of the streets—that is, not in a proprietary capacity, but as property dedicated to a public use.

There is nothing in the character of the state's ownership of the bed of the waterway which negatives a right of access by the abutting property-owner, and such right of access is strictly analogous to the property-owner's right of access to the streets adjoining his property.

We do not question the doctrine laid down by the Supreme Court of Washington in the case of *Eisenbach v. Hatfield*, 2 Wash. 236, and the numerous other later decisions following that case. It is undoubtedly the established doctrine in this state that the owner of upland as such has no right of access across intervening state owned tide or shore lands to the navigable waters in front thereof, unless he acquires such right by grant from the state. The source of title to uplands is the United States. By Section 1, Article XVII of the State Constitution, the state asserted its ownership to the beds and shores of navigable waters of the state, including the tide and shore lands up

to the line of ordinary high tide in tidal water and to the line of ordinary high water in navigable rivers and lakes. This declaration of state ownership of tide and submerged lands is merely declaratory of the law as recognized by the decisions of this court in the absence of such state declaration, and declared the state policy to extend the state's right of control and regulation of the shores at tidal waters to the shores and beds of navigable lakes and rivers.

Hardin v. Jordan, 140 U. S. 381, 382.
Shively v. Bowlby, 152 U. S. 1.

Prior to the admission of the state into the union, the title to these submerged lands was held by the United States in trust for the future state. The unsold uplands were held by the United States as owner. Upon the admission of the state into the union the title to these tide and submerged lands passed automatically to the state. The point decided by the *Eisenbach* and subsequent cases is that a person acquiring title from or through the United States to uplands, did not acquire title to or any right in the submerged lands owned by the state in front of the uplands, and that riparian rights over the state's submerged lands did not attach to or pass as an appurtenance to uplands derived

by contract or mesne conveyances from the United States. What rights the state would permit such upland owners to acquire over the state's submerged lands and the conditions that would be attached thereto were entirely questions for the state. Neither the *Eisenbach* case nor any other Washington case cited by counsel for appellant holds that a state grant of shore or tide lands does not carry the littoral or riparian right of access to navigable waters fronting thereon. What they hold is that under the Constitution and laws of this state the conveyance of the uplands, title to which is deraigned from the United States, does not pass riparian rights over tide and shore and other submerged lands owned by the state. The property owned by the respondent Railroad Company in this case was not upland, but was tide land formerly owned by the state and by it conveyed by mesne conveyances to respondent. The doctrine of the *Eisenbach* case and other state cases dealing with the right of the upland owner to access to the navigable waters in front thereof over state owned tide and shore lands, has no bearing upon the question of the right of the purchaser of tide lands from the state to access to the navigable waters of an artificial waterway created by the state through and over its own tide lands.

The title of the respondent Railroad Company in this case is similar to the title of Bowlby in the case of *Shively v. Bowlby*, 152 U. S. 1. There Shively claimed littoral rights as the owner of the uplands; Bowlby claimed littoral rights by virtue of his purchase of the tide lands from the state. Both the state court and this court treated littoral rights—including the right of access to the navigable water and the wharfage right—as belonging to the owner of the tide lands. The only distinction between the Bowlby rights in that case and those of respondent lies in the fact that Bowlby's tide lands fronted natural tide-water, while respondent's tide lands front on an artificial waterway created by the state.

The state was the sole owner of this body of tide lands lying south of Elliott Bay. As such owner it created this waterway running through its own lands, and it had a right to and did impress upon the waterway such incidents and characteristics and attached such rights in the waterway to its subsequent grants of abutting lots as it saw fit. It undoubtedly could have provided for a water area within the limits of the waterway similar to the harbor area created by the Constitution in the bays and inlets of the sea. On the other hand, we as-

sume it will not be denied that the state, being such absolute owner of the land, had the right to create the waterway over its own land without creating any harbor area within its limits. Article XV of the Constitution has no application to such a situation. It applied to the natural waters of the state existing at the time the Consitution was adopted. This artificial waterway is wholly a statutory creation. If the statute creating the waterway had specifically provided that subsequent purchasers from the state of adjoining lots should have rights of access to the waterway, it could not reasonably be contended that such rights would not have attached to such grants.

Even if it should be held that Article XV of the State Constitution requires the establishment of harbor areas in artificial waterways created by the state, it has never done so with respect to this waterway. The court below expressly held that no harbor lines or harbor area had been established in this waterway, and appellant states in its brief that it does not controvert that finding on this appeal. The Constitution required the establishment of the harbor lines by a commission appointed by the legislature. The mode of exercising the power, as prescribed in the Constitution, is a limi-

tation upon the power of the legislature. Constitutional harbor lines cannot be established in navigable waters in any manner except by the mode prescribed in the Constitution itself. This principle is recognized by the Supreme Court in

Puget Mill Company v. State, 93 *Wash.* 128-137.

Harbor lines cannot be established by legislative fiat. The Harbor Line Commission in establishing the pier-head lines in this waterway, evidently did not intend that the pier-head line should be in legal effect a harbor line. The same commission established the harbor lines along the shore of Elliott Bay in obedience to the constitutional mandate, and designated them respectively "outer harbor lines" and "inner harbor lines." At the same time—and as shown on the same map—they established this waterway and established the line therein called "pier-head line." The term "harbor lines" is used in both the Constitution and statutes of the state and has a well understood meaning. The term "pier-head line" is not used in either the Constitution or statutes of the state. Its meaning, therefore, must be determined by other considerations.

In the case of *Puget Sound Mill Company v. State*,

supra, the commission had established a pier-head line in their plats of Lake Washington. Referring to the significance to be attached thereto, the Supreme Court in the Puget Mill case, *supra*, used the following language:

> "The designation of a pier-head line alone upon the state's plats, is not, as we view the law, the establishing of harbor lines or harbor areas. These words may suggest the outer limits of the piers, but we think they should, in no event, be construed as fixing the inner harbor line, which, when established, becomes the outer shore line boundary."

It is our view that the state, after the sale of these abutting lands, had no power to establish a harbor area within the limits of this waterway with the effect of destroying the right of access to the navigable waters of the abutting lot owners; but that question is not involved in this case. No harbor area has ever been established in this waterway, and, therefore, the appellant was not entitled to a decree in its favor based upon the assumption that the state may, at some future time, establish a harbor area. In the Puget Mill Company case, the court held that even where the state had the right to establish a harbor area, but had not done so, the purchase of the shore lands from the state, gave the purchaser the right of access to the navi-

gable waters in front thereof, and that the state could not interfere therewith except by lawfully establishing a harbor area in the method prescribed by the State Constitution. If such right exists as against respondent, it is preserved to appellant by the decree of the court below.

A similar ruling was made in

State v. Sturtevant, 76 Wash. 158-166.

It follows that Article XV of the Constitution withdrawing harbor areas from private use except under lease from the state, and the state decisions, such as the *Eisenbach* case, denying riparian rights to upland owners in these harbor areas established in tide, shore and submerged lands owned by the state, may be disregarded as inapplicable in this case, first, because the constitutional provision does not apply to an artificial canal created by the state across state-owned tide lands; and, second, because no harbor lines or harbor areas have been established in this waterway. If the state should ever establish a harbor area within this waterway, its legal effect as against abutting lot owners can be determined when the case arises. That question is not involved and was not decided in this case.

The right of the respondent to access to the navigable waters and to "wharf-out" to the pier-head

line, depends in the last analysis upon a proper construction of the grant by the state of the abutting lots, and a consideration of the legislative act creating the waterway, the acts of the state through its officers in establishing and marking the pierhead lines thereon, and the relation of the abutting land to the waterway; and from these circumstances the intention and purpose of the state in its grant of the adjoining lots must be ascertained.

(a) We recognize the rule that grants by the state are to be strictly construed in favor of the state; but these grants, like all others, must be construed in such a way as to give effect to the intent of the parties, so far as the language will permit.

In *State v. Sturtevant*, 76 Wash. 158-166, the court, in recognizing the rule that "a grant by a sovereign state is to be construed most strongly against the grantee," states that "it is also a rule as well, if not better, established, that a grant from a sovereign when made either with or without consideration, is to be so construed as to effectuate the legislative intent, and avoid, if possible, unjust and absurd consequences," citing *U. S. v. O. & C. R. Co.*, 146 U. S. 526, and *Miller v. Mendenhall*, 43 Minn. 95.

(b) We have heretofore pointed out that the defendant's predecessors in title were the owners of the upland abutting upon these tide lands. By the assertion of title on behalf of the state, in Article XVII of the State Constitution, to the tide and shore lands, these owners were shut off from navigable waters by the interposition of the tide land area owned by the state.

The first legislature of the state passed an act—Session Laws, 1889-90, pp. 431-7—Section 11 of which provided that the owner of abutting uplands should have the preference right to purchase from the state the whole or any part of the tide lands in front of his lands, at the appraised value. Section 12 of the same act provides:

> "When the abutting upland owner has attempted to convey by deed to a *bona fide* purchaser any portion of the tide lands in front of such uplands, or littoral rights therein, such right of purchase herein given to the upland owner shall be construed to belong to such purchaser, or to any person, association or corporation claiming by, through or under such purchaser, to the extent of the tract or rights so conveyed."

This is a clear legislative recognition that a purchaser of tide lands from the state would thereby acquire the littoral rights as a part of or an appurtenance to the land purchased.

As pointed out by the Supreme Court in *State v. Sturtevent*, 76 Wash. 158, the legislature, apparently recognizing that these upland owners had been dealt with somewhat harshly, passed this act giving the upland owners the preference right of purchase of the intervening tide lands, for the purpose of enabling such upland owners to acquire the riparian rights in the navigable waters by such purchase. The court said:

> "In other words, the upland owner was given the first right to purchase the right of access to deep water which the state had previously cut off, that is, the riparian right in the shore."

And again:

> "That littoral and riparian rights attach to shore lands, is recognized in *Bilger v. State* where, after holding that the purchaser of shore lands took title free from any claim of the upland owner as to riparian and littoral rights, the court said: 'It follows, therefore, that such littoral and riparian rights as the respondents have in the waters of Lake Washington, were acquired by them in virtue of the purchase of the shore lands made by them from the State of Washington.'"

That the purchaser of either tide or shore lands acquires the riparian rights is also recognized in *Van Siclen v. Muir*, 46 Wash., 38, and *Muir v. Johnson*, 49 Wash., 66.

In all of these cases the court not only held that littoral or riparian rights pass from the state to the purchaser of the adjoining tide or shore lands, but that such rights include the right of access to the navigable waters in front thereof and the wharfage right.

Appellant contends that these cases were dealing with rights acquired by a purchaser of shore lands and are not applicable to the purchaser of tide lands. The cases cited involved the rights of the shore land owners on Lake Washington. The statutes of the state define tide lands as extending to the harbor line, when established, while the outer boundary of shore lands is not stated. That distinction, however, in the description of the area, does not qualify the broad doctrine laid down in these cases with respect to the littoral and riparian rights acquired by the purchaser of either tide or shore lands. The constitutional reservation of title extends alike to both, and, as pointed out by the Supreme Court in the Sturtevant case, the effect of this constitutional provision was to interpose between the upland owner and the navigable waters, a strip reserved by the state called "tide land," where there is an ebb and flow of tide, and "shore land" in the lakes and navigable rivers. The pref-

erence right to purchase referred to by the court in that case extended to both tide and shore lands, and was passed in order to give the purchasers of either tide or shore lands the right to reach navigable waters in front of the land so purchased by them, and this right is recognized in all of these cases. Littoral rights were also recognized by the statute above quoted as attaching to the tide lands.

While the cases cited involved riparian rights in Lake Washington, the principle announced is applicable to any navigable waters.

In the *Van Siclen case, supra*, the court says:

> "As an upland owner merely he has no riparian or littoral rights in the navigable waters of the lake. These belong to the owner of the shore lands, which at the present time is the state, and it, and it only, can claim that an obstruction placed in such navigable waters is an interference with the riparian and littoral rights following the ownership of the shore lands," citing the *Eisenbach* case.

Again, in *State v. Sturtevant*, 76 Wash. 158, 165, the court, referring to *State ex rel. v. Forrest*, 11 Wash., 227, stated that that case "proceeded upon the theory that the Constitution and then existing statutes made it plain that it was the policy of the state to dispose of its tide and shore lands of the first class up to the line of navigability or

up to the inner harbor line." It will be noted that no distinction is intimated between the state's policy, as fixed by its Constitution, with respect to riparian and littoral rights; they belong to the owner of the tide land or the shore land, and extend, where harbor areas have been established, to the harbor line, and where harbor lines have not been established, to the line of navigability.

> "The only right which the state has ever undertaken to maintain in trust for the whole people is the right of navigation. * * * The area lying between high water and the line of navigability, as fixed or to be fixed by the inner harbor line, being, whether submerged or not, theoretically non-navigable, is treated as land and not water, and is wholly within the keeping of the state. The value of shore lands in most instances lies in the fact that ownership gives access to deep or navigable water. The state has sold, and the purchaser has bought, believing this to be true. The right of a riparian proprietor or a shoreowner to improve up to the line of navigation and to erect docks and piers, though sometimes denied, is now well settled."
>
> *Sturtevant case, supra.*

We think these cases clearly settle the local law to the effect that riparian and littoral rights belong to the owner of the abutting tide or shore land, whether such owner be the state or its grantee; and, as to natural—as distinguished from arti-

ficial—navigable waters, these rights include the right of access and the "wharfing-out" right. The use of the word "littoral" by both the legislature and the court, indicates that both had in mind the rights of shore owners on arms of the sea.

In the present case the state had given the upland owner the preference right to purchase the intervening land between his upland and the navigable waters, and thereby acquire right of access to such waters; but before conveying the tide land to such purchaser, the state created an artificial waterway across the tide lands and platted the tide lands so as to abut upon this artificial waterway, instead of upon the shore of the sea. Under these circumstances—having in view the policy of the state in granting this preference right to purchase, as explainted by the Supreme Court in the *Sturtevant* case, and the general rule that the right of access is appurtenant to tide lands,—it would seem reasonable to expect the state to grant to the purchaser of these tide lands the right of access to the navigable waters of such artificial canal upon which the land so abuts; or, if the state intended to withhold from the purchaser such right of access, that it would signify this intention in some way, either in the legislation creating the waterway, or

by some significant designation or marking on the plats of the waterway, or in its grants. It being the established doctrine of the state that riparian rights upon abutting navigable waters attach and become appurtenant to tide and shore lands when sold by the state, a contrary intention in the present instance should be clearly and plainly shown by some legislation or act of the state. An intention to separate the water right of access and wharfage from the abutting property will not be inferred from the mere platting of the ground with a line running along the shore.

Watson v. Peters, 26 Mich., 508.
Bailey v. Burgess, 11 R. I., 330.

To now attribute to the state an intent to sever the water right from the abutting property, when the state did not clearly manifest such intention at the time it disposed of the abutting property, is an imputation upon the state's good faith. It is also pertinent to observe in this connection that the waterway was practically useless without wharves; that, if it was not intended that the abutting owner should construct such wharves, they could not be constructed by anyone, as there was no law (prior to this act of 1913) that authorized the leasing of the wharfage privilege or the construction of

wharves within the waterway area by any other person or municipality. By the terms of the Act of 1889, under which these waterways were created and dedicated to public use, none of the area therein could be leased by the state; and consequently no wharves could be constructed therein, unless it was intended that the abutting owner should have that right. The necessity for wharves, and the failure to make provision for their construction otherwise, certainly suggested, at least, that it was intended that the wharves would be constructed from time to time as needed, by the person most interested, the adjoining owner.

(c) The harbor areas created under Article XV of the Constitution, are clearly defined upon the state plats, and the respective rights of the state and of abutting owners therein were clearly defined in the Constitution and the statutes carrying this provision of the Constitution into effect. It was the policy of the state with respect to these areas, as expressed in the Constitution, to reserve them forever from sale and provide general laws for leasing them for use in connection with commerce and navigation. If the state had intended to reserve a similar area within the limits of these artificial waterways, it would unquestionably have

followed the same general scheme of management, that is, the legislation creating the waterway would have provided for reserving the area from sale, and the state officials would have been authorized by the act to lease these areas in the same manner as harbor areas were authorized to be leased. In the act creating the artificial waterways, however, no such plan is outlined. On the contrary, the act specifically provides that these waterways (which include the entire area therein) shall never be *leased* by the state.

Undoubtedly, it was contemplated that wharves would be constructed within the limits of the East Waterway, where it had a width of one thousand feet. The waterway would be practically worthless without wharves. The commissioners in establishing the waterway, designated a pier-head line thereon, and this line must imply that wharves or piers may be constructed from the shores out to that line. That is the significance attached to a pier-head line by the State Supreme Court in its decision in the *Puget Mill Company's* case, *supra.*

These wharves could be constructed and operated in either of three ways:

(1) By the state.

(2) By a lessee of the state.

(3) By the owner of the abutting property.

(1) It cannot reasonably be assumed to have been intended by the legislature that the state itself would construct and operate these wharves, because it was not at that time either the policy or practice of the state to engage in the wharfage business or to construct and own wharves. Its declared policy with respect to harbor areas, as shown by the Constitution and statutes at that time, was to lease this area for wharfage purposes, retaining only the general power of regulation of rates.

(2) It was not the intention of the state to lease the area in the artificial waterways for wharfage purposes, because the act creating the waterways specifically provided that the area should be forever reserved from lease as well as from sale.

(3) It must, therefore, have been the intent of the legislature when this legislation was passed creating waterways, that the owners of the adjoining or abutting lots should have the wharfage right.

Where the state has established a line marking the line of navigability, it is generally held by the courts that the establishment of such a line operates as an invitation and concession to the shore owner

to utilize the area between the shore and such line for access to the navigable waters, and that a grant by the state of the abutting lands carries with it this right of access and the right to wharf out to such established line, in the absence of any legislation by the state to the contrary.

In *Aborn v. Smith*, 12 R. I., 373, the court held that the establishment by the state of such a line—called in that state a "harbor line"—was a permission or authorization to the abutting owner to wharf out to such line. In this case the line was designated as a "harbor line," but there appears to have been no constitutional or statutory definition of such a line in Rhode Island, so that the legal effect was the same as the establishment in this state of a line called "pier-head line."

In *Miller v. Mendenhall*, 43 Minn., 95; 44 N. W. 1141, the state had also designated a line called a "harbor line" along navigable waters. With respect to this line the court said:

> "The action of the legislature in establishing a harbor line is to be construed as a regulation of the exercise of the riparian right. It settles the line of navigability above which the state will not interfere, and is an implied concession of the right to build, possess and occupy to the established line, which amounts practically to a qualified possessory right."

This Minnesota case is cited by the Supreme Court of Washington in *State v. Sturtevant*, 76 Wash., 158, with approval.

Appellant cites *Wilson v. O.-W. R. & N. Co.*, 71 Wash., 102, as holding that the establishment of a pier-head line beyond the harbor lines confers no rights upon the lessee of the harbor area. It does not so hold. In that case the state, pursuant to the Constitution, had established harbor lines in these waters, and had leased the harbor area. The War Department had established a line, which prescribed the limit of encroachment upon the navigable waters, this line being beyond the outer harbor line. Wilson was a lessee of the harbor area; the railroad company had by proper authority, constructed a bridge across the river, one of its piers being located between the outer harbor line of the state and the line of navigation established by the War Department. The court held that the lease of the harbor area by the state to Wilson did not give him any such interest in the bed of the river beyond the harbor area as entitled him to claim consequential damages for the construction of a bridge pier therein under state and United States authority. The case has no bearing whatever upon the significance to be given to a pier-head line established by the

state in a canal created by it upon its own lands, and the survey and sale by the state of the lands abutting thereon. The line of navigation established by the War Department merely signifies the consent of the government to the building of structures out to that line, but gives no title or right, as the state owns the bed of the stream; but when the state as well as the War Department establish this line of navigation, they both signify their consent that the owner of the riparian right of access may build out to that line.

That the right of access and to wharf out to navigable waters exists in this state, as an appurtenant to the abutting land—except as cut off by the Constitution and statutes of the state where harbor areas have been established—as has already been pointed out, is expressly decided by the court in the Sturtevant case. The court there says:

> "The right of a riparian proprietor or shore owner to improve up to the line of navigation and to erect docks and piers, though sometimes denied, is now well settled. 29 Cyc., 341; Farnham on Waters, Section 101; *Miller v. Mendenhall*, 44 N. W., 1141."

In that case the state had sold the shore lands on Lake Washington. Under the statute defining the shore lands, the outer or water boundary was not defined. After the state had sold these shore lands,

the state artifically lowered the waters of the lake, thus withdrawing the line of navigability further from the shore. The state contended that the grants from the state were present grants and conveyed the submerged lands only out to the line of navigability as it existed at the date of the deeds. The court held, however, that the state conveyed the riparian right of access to the navigable water, and that if it artifically changed the line of deep water, the shore land owner's riparian rights extended out to the new line of deep water. This case clearly recognizes the principle that right of access, including the "wharfing-out" right, attaches to and passes as an appurtenance of the abutting land, save only where the right is denied by the Constitution as to uplands.

The appellant contends that the cases cited by us on this point are inapplicable to the situation of the present case. The distinction which it claims is not made very clear in its brief. It is true that both the Minnesota and Rhode Island cases cited were controversies between private parties. The principle announced in these cases, however, is applicable to all grants, whether by individuals or the state, in the absence of any state legislation restricting the terms of the grant. As stated above,

the Supreme Court of Washington cited the Minnesota case and applied the principle to a state grant in the Sturtevant case.

It is also suggested that the principle is inapplicable because of the constitutional provision of this state with respect to harbor areas. As stated above, the rights of abutting owners in this artificial area are to be determined by the legislation creating it, and the acts of the state in marking, platting and selling the abutting land, and the principle settled by the State Supreme Court to the effect that rights of access attach as an appurtenance to grants of tide and shore lands abutting upon navigable waters, in the absence of any constitutional or statutory prohibition.

It seems to us evident that Article XV of the State Constitution providing for harbor areas, does not apply to this artificial waterway. It is well settled in this state that the state as absolute owner has the right to make any disposition of tide lands it sees fit; its power to dispose of them is unrestricted; it can sell them in their submerged condition, or it can—as it did in this instance—create an artificial waterway out of a part of the tide lands, and fill and make dry land of the balance and sell in that changed condition.

That the rights of the abutting land owners are to be determined by the terms of the legislation creating the artificial canal, and the state's acts thereunder, is, we think, well settled by the authorities.

In *Dana v. Commission*, 31 Cal., 118, the court was considering rights in an artificially created water front, and used this language:

> "We do not consider that the plaintiff is a riparian proprietor in the sense in which that term is used in the law of tidewaters. He is not an owner upon the 'shore,' but upon a 'water front' of statute creation. The water front established by the act of March 5, 1851, *is what that act had made it to be*, and the rights of the plaintiff as the owner of a beach and water lot abutting upon it, exist only in subordination to that act."

See also

Weber v. Harbor Commissioners, 18 Wall. 57.

These cases hold that when the waterfront is artificially created by the state, all subsequent purchasers from the state hold their property on such water front subject to the terms and with the incidents given by the act creating the water front.

The Act of the State of Washington of 1890, authorizing the creation of artificial waterways,

designates them as "public ways," and provides that they shall be forever reserved from sale or lease and for use only for water craft. They are analogous to streets and highways in so far as the rights of ingress and egress by the abutting owners are concerned.

3. If the right of access claimed by the respondent attached to the abutting property as an appurtenance at the time the state conveyed it, such rights became vested property interests, and the state could not by any action which it might take thereafter deprive the respondent of these property rights, except by condemnation and making due compensation.

In the *Sturtevant* case the court expressly held the right of access to the navigable waters which had attached to the grant by the state of the shore lands could not be taken from the purchaser by any subsequent act of the state—that the state could not, either by its own act or by granting the privilege to another, "destroy the substance of its deed."

In *Weems Steamboat Company v. People's Steamboat Company*, 214 U. S., 345, the rule is stated as follows:

> "The rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is situated. These rights are subject to the paramount public right of navigation. The riparian proprietors have the right among others, to build private wharves out so as to reach the navigable waters of the stream * * * A private wharf on a navigable stream is thus held to be a property which cannot be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that it or any part of it be taken for the public use, due compensation must be made."

This doctrine was announced by this court as early as *Yates v. Milwaukee*, 10 Wall., 497, and has been reaffirmed in many other cases cited in the Weems case.

It does not in the least conflict with those cases in this court asserting the paramount right of the government to improve the waters for purposes of navigation, without liability to make compensation for any injury to private property rights in so doing. Riparian rights, or rights in the nature of riparian rights, in navigable waters over which the government has jurisdiction, may be injuriously affected, or possibly even destroyed, by the United

States, if such destruction is the result of governmental action in improving navigation of the waters. These property rights cannot, however, be destroyed or taken away by the state or its grantee, as is attempted to be done by the appellant in this case under the Act of 1913, not for the purpose of improving the navigation of the waters, but for the sole purpose of transferring the rights of access from the respondent to the appellant, as a source of revenue to the appellant.

Appellant has cited and quoted quite extensively from the case of *Newell v. Loeb*, 77 Wash., 182, in support of access which the state could not take from him. That case is bottomed upon the right to improve navigation by straightening the stream. The Waterway District was authorized by the state statutes to straighten and deepen the channel of Duwamish River, a navigable stream. The court stated that "the object of the improvement sought to be made by the commissioners is to straighten the channel of Duwamish River between the termini of the district." The scheme of improvement contemplated would divert the waters from a bend of the river in front of Loeb's property to a new and shorter channel; and Loeb claimed damages for loss of access to the stream. The court held that

these rights were subject to the paramount right of the state or of the United States to improve navigation. We may concede this doctrine in its broadest application. The appellant in the present case is not seeking to destroy the right of access as a result of any improvement of navigation, but to appropriate the right of access as a means and source of revenue to itself.

The decree of the court below does not in any way restrict either the United States or the state, or any grantee or agency of the state, in carrying on any plan for the improvement of the navigation of this waterway, nor from exercising proper police control and regulation of the use thereof, nor adjudicate upon the right of the state to establish harbor lines therein under Article XV of the Constitution. It adjudicates only that the port has no proprietary rights or interests in the waterway area, and is not entitled to lease the same for revenue; and that respondent Railroad Company, by virtue of the grants to it of the abutting lots by the state, is entitled to access to the navigable waters of the waterway, "subject to proper governmental supervision."

We think there is no error in this decree of which appellant can complain.

Respectfully submitted,

W. H. BOGLE,
F. T. MERRITT,
LAWRENCE BOGLE,
Attorneys for Respondent,
OREGON & WASHINGTON RAILROAD COMPANY.

SUPREME COURT OF THE UNITED STATES.

No. 107.—October Term, 1920.

Port of Seattle, Appellant, *vs.* Oregon & Washington Railroad Company and J. F. Duthie & Co.	Appeal from the District Court of the United States for the Western District of Washington.

[January 31, 1921.]

Mr. Justice Brandeis delivered the opinion of the Court.

The main question in this case is whether the Oregon & Washington Railroad Company acquired, as owner of land adjoining East Waterway in the Port of Seattle, the right to build in the waterway piers, wharves and other structures over which it would secure access from its land to the navigable channel. The question arises in a suit to quiet the title of the State which was brought against the Railroad in a state court of Washington, in 1917, by the Port, a municipal corporation,[1] created by the laws of Washington. J. F. Duthie & Co., lessees of the Railroad's land, were joined as defendants; but they have no substantial interest in the controversy; and their peculiar rights do not require consideration. The case was removed to the District Court of the United States by petition of the Railroad which is an

[1] C. 92, of the Laws of 1911, p. 412, as amended by Laws of 1913, c. 62. p. 202. It has power, among other things, to improve navigable and non-navigable waters of the United States and of the State within the port district; "to create and improve for harbor purposes new waterways within the port district; to regulate and control all such waters within the limits of such port district so far and to the full extent that this state can and hereby does grant the same, and remove obstructions therefrom; to straighten, widen, deepen and otherwise improve any and all waters . . . to execute leases of all lands, wharves, docks and property owned and controlled by said port district, upon such terms as to the port commission may deem proper." It exercises also powers similar to those exercised by counties including the power to sue and be sued. State *v.* Bridges, 87 Wash. 260. The State did not transfer to the port districts its ownership in the beds and shores of navigable waters.

Oregon corporation; and a motion to remand was denied. Upon full hearing on the merits a decree was rendered dismissing the bill. The case comes here by direct appeal of the Port under Section 238 of the Judicial Code, it having been contended by the Railroad and held by the lower court that the validity of Chapter 168 of the Laws of Washington of 1913, p. 582, is involved, and that its provisions violate the Contract Clause and the Due Process Clause of the Federal Constitution. The following facts are material:

When the State of Washington was admitted into the Union there lay in front of the City of Seattle extensive tide lands in the area now comprised within the limits of the municipal corporation known as Port of Seattle. Under appropriate legislation of the State this area has been developed as a port. Waterways have been established and in part dredged; tide lands abutting upon the waterways have been filled, platted as city blocks and laid out with streets; and lots therein have been sold for business and other purposes. Among the waterways so established is that known as East Waterway, which connects Duwamish River with Elliott Bay, an arm of Puget Sound. East Waterway, as established, has at the point in question, a width of 1,000 feet. The bed of the waterway was in its natural state tide land. The 750 feet of the waterway which lie in the centre have been dredged to a depth at mean low tide of from 26 to 30 feet. The rest of the waterway, being that portion which extends on either side for a distance of 125 feet from the bulkhead of the filled land to the fairway, is of varying depth and is not navigable by large vessels. The bed of the waterway within these 125 feet areas slopes from the bulkhead to the line of the fairway. It is exposed at low tide ordinarily at points about thirty-six feet from the bulkhead.

The Railroad's parcel here in question is filled land adjoining the west side of this waterway. The tract is a part of Block 393, Seattle Tide Lands, shown on a plat duly filed with the County Auditor in 1895, and was acquired from the State by the Railroad's predecessors in title prior to 1907. The deeds by which the State conveyed the land do not in words purport to grant any right in the waterway; nor is mention made of East Waterway either in the granting clause or elsewhere in the deed.[2] On the plat, by which

the land was sold, the boundaries of the block, and of the several lots comprised within it, are set forth clearly and lineal measurements are given. East Waterway is shown on the plat and, on each side of the waterway, a broken line called "Pierhead line", is marked at a distance of 250 feet from the bulkhead. It is alleged by the Railroad that this pierhead line, established by the War Department as prescribing the limits beyond which structures obstructing navigation would not be permitted in the waterway, had been adopted also by the state authorities. In 1914, by joint action of the War Department and of the state authorities, and with the assent of abutting owners, the pierhead line was moved back to a point 125 feet from the bulkhead, leaving the fairway in the centre 750 feet, as above stated, instead of 500 feet as originally indicated on the plat. The rights claimed by the Railroad are limited to this 125-feet area.

Chapter 168 of the Laws of Washington 1913, p. 582, provides that:

"Whenever, in any waterways created under the laws of the State of Washington, the Government of the United States shall have established pierhead lines in said waterway at any distance from the boundaries thereof established by the State, no structure shall be allowed in the strip of waterway between the boundary and the nearest pier-head line except by consent of the State land commissioner and upon plans approved and terms and conditions fixed by him, and then only for such period of use as shall be designated by him, but any permit shall not extend for a longer period than thirty years: *Provided, however*, that the owner of land

---

[2]The form of the deed is as follows:

First party does hereby grant, bargain, sell and convey unto the second party, and his heirs and assigns, the following described tide lands of the first class, situated in front of the City of Seattle, Kings County, Washington, to wit:

Lots one to nine inclusive, block 393, as shown on the official map of Seattle Tide Lands, filed with the Board of State Land Commissioners at Olympia, Washington, March 15, 1895.

Subject, however, to any lien or liens that may arise or be created in consequence of an act of the Legislature of the State of Washington entitled "An Act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the State, granting rights of way across lands belonging to the State", approved March 9, 1893.

Witness the seal of the state affixed.

HENRY MCBRIDE,
Governor.

abutting upon either side of any such waterway shall have the right, if application be made therefor within a period of ninety (90) days following the date when this act shall go into effect, to obtain . . . " a permit authorizing the improvement and use of such area under conditions to be prescribed by the state authorities upon the payment of an annual rental dependent in amount upon the assessed value of an equal area of the abutting land.

The Railroad failed to apply for such a permit. Asserting the rights above stated, it leased a part of its land to J. F. Duthie & Co. for a shipbuilding and manufacturing plant, and purported to authorize the construction of wharves, piers and other structures upon the adjoining water area up to the 125-foot pierhead line. By the Act of 1913 the control over the waterways therein conferred upon land commissioners is to be exercised in port districts by the port commissioners. This bill to enjoin such use of the waterway by the Railroad and its lessees and to quiet title was, therefore, brought by the Port of Seattle.

The decree entered by the lower court declared in substance (1) that the State has no proprietary interest in the water area between the bulkhead and the pierhead line; (2) that it is not entitled to lease the same or otherwise to deprive the Railroad of access to the fairway; (3) that chapter 168 of the laws of 1913 in so far as it provides for such leasing violates the Federal Constitution; (4) that the Railroad has no proprietary interest in the waterway, but as owner of the abutting lots is entitled to access to the deep or navigable waters "subject to proper governmental supervision." The decree declared further that the State had never established harbor lines in the waterway, and expressly recited that the court does not determine whether or not the State now has power to establish harbor lines, nor what the effect might be of hereafter establishing them.

The main question presented for our decision is whether the Railroad acquired, in connection with the lots of filled land abutting on the waterway, a private riparian or littoral right to construct wharves, dock and piers on this 125-feet area, in order to provide for itself, as owner of the land, and for those claiming under it, convenient access to the fairway for purposes of navigation and commerce. The Port contends that the Railroad acquired no such right, nor any private right whatsoever, in any part of the adjoining waterway; and that the State is free either to use this

portion of East Waterway directly for purposes of navigation, as the present fairway is used, or to use it as a part of the harbor; and that, since it is also the proprietor of the tideland, under this water area, it has the full right to develop it, or authorize its development by others, through the erection of wharves, piers, docks or other structures in aid of navigation and commerce; and to charge a rental for the privilege.

First. The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State the owner of the navigable waters within its boundaries and of the land under the same. *Weber* v. *Board of Harbor Commissioners,* 18 Wall. 57. By Section 1 of Article 17 of its Constitution the State asserted its ownership in the bed and shore "up to and including the line of ordinary high tide in waters where the tide ebbs and flows." The extent of the State's ownership of the land is more accurately defined by the decisions of the highest court, as being the land below highwater mark or the meander line, whichever of these lines is the lower.[3] The character of the State's ownership in the land and in the waters is the full proprietary right. The State, being the absolute owner of the tide lands and of the waters over them, is free in conveying tide lands either to grant with them rights in the adjoining water area or to completely withhold all such rights. Whether a conveyance made by the State of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same, is a matter wholly of local law. *Shively* v. *Bowlby,* 152 U. S. 1. Upon such questions the provisions of the constitution and statutes of the State and the decisions of its highest court are accepted by us as conclusive. *St. Anthony Falls Water Power Co.* v. *St. Paul Commissioners,* 168 U. S. 349. The precise question presented here is whether the State by executing the deed of the land, which in fact adjoined East Waterway, conveyed rights in that waterway. That question is, in essence, one of construction of the deed taken in connection with the plat therein referred to.

---

[3]See Scurry v. Jones, 4 Wash. 468; Cogswell v. Forrest, 14 Wash. 1; Washougal, etc. Transportation Co. v. Dalles, etc., Navigation Co., 27 Wash. 490; Johnson v. Brown, 33 Wash. 588; Van Siclen *c.* Muir, 46 Wash. 38, 40; Brace & Hergert Mill Co. v. State, 49 Wash. 326, 331.

Second. Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere) a conveyance by the State of uplands abutting upon a natural navigable waterway grants no right of any kind either in land below highwater mark, *Eisenbach* v. *Hatfield*, 2 Wash. 236; or in, to, or over the water, *Van Siclen* v. *Muir*, 46 Wash. 38, 41; except the limited preferential right conferred by statute upon the owner of the upland, to purchase the shoreland, if the State concludes to sell the same. Act of March 26, 1890, Sections 11 and 12, Laws of Washington 1889-1890, p. 435. The grantee of the upland cannot complain of another who erects a structure below highwater mark, *Muir* v. *Johnson*, 49 Wash. 66. He does not acquire any right of access over the intervening land and water area to the navigable channel, *Lowndale* v. *Grays Harbor Boom Co.*, 54 Wash. 542, 550, 551. So complete is the absence of riparian or littoral rights that the State may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water. *Newell* v. *Loeb*, 77 Wash. 182, 193-194; *Hill* v. *Newell*, 86 Wash. 227, 228.[4]

Third. The Railroad admits that such are the rights of a grantee from the State, where it is the upland which is conveyed. But it contends that a different rule applies where the sale is of tide lands. No basis for the distinction can be found either in the decisions of the highest court of the State or in reason. Since the upland owner has been denied riparian rights in deference to the asserted right of the State to control unhampered the course and development of navigable waters, the State's right must be superior also

[4]In some States the shore between the high and the low water mark belongs to the private owner of the upland and as such owner he has all rights not inconsistent with the public's rights incident to navigation. In other States, although the land below high watermark belongs to the State, the private owner of the upland has the right of access over it to the navigable channel and the right to use the State's land in connection therewith. See 27 R. C. L., Section 273-279, 284. But, in Washington, it is "uniformly held that there is no riparian right in the owners of lands bordering on the navigable waters of the state", and that the State retains the proprietary right to the soil below high water mark. State v. Sturtevant, 156, 163; Brace & Hergert Mill Co. v. State, 49 Wash. 326, 331. The language of some earlier cases apparently in conflict with these views, was explained in Hulet v. Wishkah Boom Co., 54 Wash. 510, 517. The cases referred to go no further than to hold that

to the claim of the tide land owner. For the assertion of title in the State was obviously made in order that it might not be hampered in developing waterways and harbors in the manner and to the extent that the public interest should from time to time demand. Such development obviously includes harbor facilities, like piers, docks and wharves, as well as adequate channels. Compare *State* v. *Bridges*, 87 Wash. 26. The proprietary right of the State over navigable waters and of the soil thereunder is neither exhausted nor impaired by making a sale of a tract of tide land, be it the parcel nearest the upland or some other. The State may in one year fill and sell the hundred feet of tide lands nearest the upland and in the next year fill and sell the parcel beyond. Compare *State* v. *Scott*, 89 Wash 63, 70, 72. Or it may sell first the parcel more remote from the upland and later the one immediately adjoining it, or any other. In every case it may, in conveying the tide land, either grant or withhold rights in the water or in the water area, as it sees fit. When land washed by the ebb and flow of the tide is conveyed by the State with clearly defined boundaries, no rights of any kind beyond those boundaries ordinarily pass under the deed. *Pearl Oyster Co.* v. *Heuston*, 57 Wash. 533. Where a tide land owner acquires rights of access to deep water it is by arrangement with the owner of the intervening land. Compare *Pioneer Sand & Gravel Co.* v. *Seattle Construction and Dry Dock Co.*, 102 Wash. 608.

The cases most strongly relied upon by the Railroad do not relate to tide lands. They deal with the rights of shoreland owners on an inland lake, the level of which had been lowered by the Government. *State* v. *Sturtevant*, 76 Wash. 158; *Puget Mill Co.* v. *State*, 98 Wash, 128. Shore lands differ from tide lands not only in their situation, which in many cases makes an almost indefinite filling in of the latter a possibility, but also in legal definition. Tide lands have a definite boundary at the line of mean low tide; or, by later legislation, of extreme low tide. *State* v. *Scott*, *supra*, pp. 68, 69. The shore lands, on the other hand,

---

the owner of uplands has a right in common with the public to use the stream for navigation, as it flows past his land; and that others conducting operations upon the river may not wilfully or negligently destroy his upland. Dawson v. McMillan, 34 Wash. 269; Monroe Mill Co. v. Mensel, 35 Wash. 487; Burrows v. Grays Harbor Boom Co., 44 Wash. 630; see also Judson v. Tide Water Lumber Co., 51 Wash. 164.

were those "below the line of ordinary high water and not subject to tidal flow." They had no defined outer boundary. Accordingly when the waters of the lake there in question were lowered, it became necessary to determine the ownership both of the lands exposed and those below the new line of ordinary high water. The court held that the outer boundary of the shore land was the line of navagability and that grantees were entitled to follow that line out when it was moved by act of their grantor. The considerations which brought the court to this result were, it is true, largely the same which in other jurisdictions led to the recognition of riparian rights, that is, the claim of the shore land owner to access to deep water. But the court did not secure this interest to the shore land owner by granting him extraterritorial rights—*i. e.* riparian or littoral rights. It did so by construing the outer boundary of his land to be the line of navigability; holding that since the legislature had not limited the outer boundary of shore lands, as it had done in the case of tide lands, it must have intended that the shore lands granted should extend to the line of navigable water, in the absence of legislation to the contrary. Compare *Bilger* v. *State*, 63 Wash. 457. The legislature confirmed this boundary, expressly restricting it to the lands to which the court had applied it; that is shore lands not within city limits. This doctrine can have no application to shore lands where the property line is fixed in the deed. And it cannot apply to tide lands, the dissimilarity of which to shore lands furnished the ground for enunciating the rule.

It appears, therefore, that the law of Washington does not recognize as appurtenant to upland, tide land or shore land in its natural condition, rights of any sort beyond the boundaries of the property. A right of access to the navigable channel over intervening land, above or below low water, must arise from a grant by the owner of the intervening property.

Fourth. The Railroad contends that a different rule should be applied here where we are dealing with made land abutting on an artificial waterway. East Waterway is not properly described as such. It is a natural waterway deepened and confined. Compare *Fox River Flour & Paper Co.* v. *Kelly*, 70 Wis. 287, 800. And obviously the mere fact that tide land conveyed has been filled would not, by the law of Washington, confer upon the grantee, as ap-

purtenant to the land, riparian rights in adjoining navigable waters. But the Railroad insists that even if the right of access to the navigable channel is not appurtenant to its land as a matter of riparian law, its predecessor in title received the right by implied grant from the State. The right, it says, "depends in the last analysis upon a proper construction of the grant by the State of the abutting lots" in the light of all the circumstances. Among the most important of those, is the fact that the whole development project was an artificial creation. Land, it is urged, was artificially made up to a bulkhead. At some distance beyond a navigable channel was artificially created out of an unnavigable stream. Between the bulkhead and the channel are shoals which prevent full use of waterside lots in connection with navigation unless wharves are erected. When the original grant was made no provision in the law authorized leasing these shoals for docking purposes, but on the contrary the whole waterway was reserved by the statute forever from sale or lease. And, finally, the plat, by reference to which all lots were sold, showed a pierhead line at the point of navigable water. This situation, it is urged, indicates that the lots were sold as part of a completed project, that it was intended they should have full shipping facilities, and that since the State could not lease the shoals under then existing legislation, it must have been the intention that abutting owners should have the right of access to the pierhead line. This argument of the Railroad, rests, however, upon an assumption which is at least open to serious doubt. It asserts that under then existing legislation no state official was authorized to permit the grantee to construct a wharf in East Waterway. By the Constitution (Article XV, Section 1, and by Acts of March 28, 1890, p. 239) provision had been made for the establishment of harbor lines in navigable waters. It appears from *Wilson* v. *Oregon-Washington Railroad & Navigation Co.*, 71 Wash. 102, 107, to have been the practice to permit parts of the harbor area so created to be used for the erection of piers and wharves. East Waterway was and is one of the navigable waters of the State. Our attention has not been called to any statute or decision which indicates that at the time of the original grant power to create harbor areas in it and to grant permits to erect wharves therein would not have been possessed by the harbor commissioners.

Even if the assumptions upon which the arguments rest were all true, the conclusion contended for would not follow. Ever since the organization of the State it has been the clearly defined policy of Washington not to grant riparian rights in navigable waters. This policy, declared in its constitution and expressed in careful legislation, has been consistently enforced by its courts. A grant by implication of the riparian right here asserted might perhaps be inferred in other jurisdictions from the circumstances stated. But in Washington such an implication seems wholly inadmissible. If in the development in question it had been the intention of the State to make such a radical departure as that for which the Railroad contends, the intention would doubtless have been expressed by appropriate language in the deed. But East Waterway was not even mentioned in it. Until we are so informed by the Supreme Court of Washington, we cannot, in the light of the waterway history of the State, believe that there were implications in the situation described which without more are sufficient to indicate an intention to depart from the settled policy of the State.

So far as the pierhead lines are concerned, the Railroad concedes that their establishment by the United States did not create as against the State a right to wharf out. They merely fixed the line beyond which piers might not extend. Compare *Wilson* v. *Oregon-Washington Railroad & Navigation Co., supra,* pp. 107, 108. And the power of the United States in this respect was not exhausted by its first exercise. *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 638. The lines so fixed, although acted upon by the erection of piers, could be changed by the United States at any time. *Greenleaf Johnson Lumber Co.* v. *Garrison,* 237 U. S. 251. From the authorities to which we have been directed it appears that under the laws of the State the presence of pierhead lines on the plat could have no effect other than as a publication of action taken by the Federal Government. In *Puget Mill Co.* v. *State,* 93 Wash. 128, decided in 1916, the power of state officials to establish such lines is expressly denied by Judge Chadwick, who said:

"The use of the word 'pierhead line' on the plat prepared by the State and in the decree is an unfortunate misuse of terms. The word means nothing under our Constitution and statutes. In some of the Eastern states, we understand that 'pierhead lines' are defined, but the constitution makers in this State were

careful to avoid the confusion that may result from the drawing of an arbitrary line beyond which piers and docks may not be erected, by providing for an inner and an outer harbor line with an intervening area subject to state ownership and control."

It is unnecessary, therefore, for us to consider whether on this record it is open to the Port to contend that pierhead lines were in fact never fixed by any state official.

Fifth. The Port renews here the objection that the case was improperly removed from the State court. *Germania Insurance Co.* v. *Wisconsin*, 119 U. S. 473; *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482; insisting that since the State is the owner of the bed of East Waterway, it is the real party in interest. *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151; *Lankford* v. *Platte Iron Works*, 235 U. S. 461; and that it has not merely a governmental interest, as in *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 390, and in *Wisconsin, Kansas & Texas Railway Co.* v. *Missouri Railroad & Warehouse Commissioners*, 183 U. S. 53, 60. The objection to the jurisdiction of the District Court is clearly unsound. The Port being a municipal corporation under the laws of Washington is a citizen of that State and could have been sued in the Federal Court. *Lincoln County* v. *Luning*, 133 U. S. 529; *Chicot County* v. *Sherwood*, 148 U. S. 529. It had both the power and the duty to bring suit to protect the interests here involved; and it had a direct financial interest in the result. For Chapter 168 of the Laws of 1913 provides for a payment by abutting owners, in the nature of a rental, for the permit to use parts of the waterways in the erection of wharves, docks or other structures; and that 75% of such rental shall be paid to the county "for the use of said port district." The Port has thus an independent financial interest in this controversy; and although the State has also an interest, suit against the Port would not be prevented by the Eleventh Amendment. What effect the judgment in this case will have upon the State's interest we have no occasion to consider. Compare *Tindal* v. *Wesley*, 167 U. S. 204; *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636.

Reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.